Supreme Court, U.S.
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**No.**

IN THE

# Supreme Court of the United States

SOUTHWIRE COMPANY,

*Petitioner*,

v.

JOHN STEPHEN JANOWICK, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

In *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440-441 (1999), this Court held that participants in a defined benefit pension plan have a "right only to their 'accrued benefit,'" and "have no entitlement to share in a plan's surplus...." The United States Courts of Appeals for the D.C. Circuit and the Seventh Circuit have both since looked to the governing trust and related documents to determine the rightful owner of proceeds arising from the demutualization of an insurance company in connection with ERISA benefit plans. *Stewart v. Nat'l Educ. Ass'n*, 471 F.3d 169, 177 (D.C. Cir. 2006); *RLJCS Enters., Inc. v. Prof'l Benefit Trust Multiple Employer Welfare Benefit Plan and Trust*, – F.3d –, 2007 WL 1262010 *5 (7th Cir. 2007).

The question presented is whether, when an ERISA plan trustee receives demutualization proceeds, the proceeds are distributed based upon the benefit plan and other related documents as held by the D.C. Circuit and the Seventh Circuit, or instead are payable to the plan participants in excess of their accrued benefit, under the different standard applied by the Sixth Circuit below, which did not consider the governing trust documents?

## PARTIES TO THE PROCEEDING

Petitioner is Southwire Company ("Southwire"), interpleader defendant in the district court and appellee before the United States Court of Appeals for the Sixth Circuit. Southwire is the sponsor of the National-Southwire Aluminum Company Pension Plan ("the Southwire Plan") – a now terminated defined benefit pension plan funded solely by Southwire.

Respondents are John Stephen Janowick, Gary Erwin and Merl Kannapel, on behalf of themselves and as the representatives of a class of current and deferred annuitants of Prudential Group Annuity Contracts GA 5543 and GA 5542 (collectively "the Annuitants"), and Century Aluminum Company ("Century"), both interpleader defendants in the district court and appellants before the Sixth Circuit. The Annuitants were participants in Southwire's terminated pension plan and are the individual third-party beneficiaries under the group annuity contracts purchased to satisfy all benefit liabilities under the Southwire Plan upon its termination. Century purchased Southwire's Hawesville, Kentucky aluminum smelting plant and its operating assets fifteen years after termination of the Southwire Plan.

Bank of New York ("BNY"), as successor to the Irving Trust Company ("Irving Trust"), the former trustee for the Southwire Plan, was the interpleader plaintiff at the district court. BNY was dismissed as a party by the district court after it paid the funds in question into the registry of the district court.

## RULE 29.6 STATEMENT

Southwire is not a subsidiary or an affiliate of a publicly owned corporation.

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## PETITION FOR A WRIT OF CERTIORARI

Southwire respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

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## OPINIONS BELOW

The majority and dissenting opinions of the Sixth Circuit are reported at 470 F.3d 264 and are reprinted in the appendix hereto ("App.") at 1a. The district court's two memoranda and opinions granting summary judgment in favor of Southwire on its claim for entitlement to the demutualization proceeds are unreported and are reprinted at App. 22a-41a.

## JURISDICTION

The judgment of the Sixth Circuit was entered on November 22, 2006. App. 1a. A timely petition for rehearing with suggestion for rehearing *en banc* was denied on March 26, 2007. App. 20a. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

Relevant statutory provision, 29 U.S.C. § 1002(35), 29 U.S.C. § 1104(a)(1), and 29 U.S.C. § U.S.C. § 1344(d), are set forth at App. 42a-48a.

## INTRODUCTION

This petition asks the Court to resolve a conflict between the decision below and this Court's decision in *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, as well as a deepening conflict among the Federal Courts of Appeals

concerning the legal principles that govern the ownership of proceeds received by a benefit plan trustee as the holder of group annuity contracts when the insurance company that issued the contracts demutualizes ("Demutualization Proceeds").

Here, the Sixth Circuit invoked several alternative legal theories to award the Demutualization Proceeds to the Annuitants, thereby providing them with a benefit in excess of the accrued benefits to which they are legally entitled. In doing so, the Sixth Circuit failed to correctly apply this Court's holding in *Hughes Aircraft* that participants in a defined benefit pension plan "have a nonforfeitable right only to their 'accrued benefit,'" and have no right to the surplus assets of a trust underlying the plan. *Id.* at 440-41.

In contrast, the D.C. Circuit and the Seventh Circuit recently held that individual participants in employee benefit plans funded through group insurance policies are not entitled to demutualization proceeds received after the demutualization of the insurance company which underwrote the plan, and that the proceeds instead belonged to the plan trust which purchased the policies. *See Stewart v. Nat'l Educ. Ass'n*, 471 F.3d at 177; *RLJCS Enters.*, 2007 WL 1262010 at *5 (concluding that a trust that paid the premiums for a group life insurance policy was the "owner" of the policy and the demutualization proceeds flowing from the policy). Unlike these other courts that have addressed this issue, the Sixth Circuit disregarded the nature of the plan as a defined benefit plan, as well as the consideration of which party funded the group annuity contracts. *See Hughes Aircraft*, 525 U.S. at 439; *Stewart*, 471 F.3d at 177; *RLJCS Enters.*, 2007 WL 1262010 at *5.

The Sixth Circuit's decision also conflicts with and overlooks established trust law principles recognized by this Court which served as the basis for the district court's

conclusion that Southwire,[1] as the plan sponsor that solely funded the trust used to purchase the group annuity contracts, was the rightful owner of the demutualization proceeds. This Court's decisions in *Hughes Aircraft*, 525 U.S. at 443; *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); and *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995), establish that when an employer terminates a pension plan, its actions are analogous to that of a settlor of a trust. Correspondingly, this Court's decisions in *Varity Crop. v. Howe*, 516 U.S. 498 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1988); and *Central States, South East & South West Areas Pension Fund v. Central Transportation, Inc.*, 472 U.S. 559 (1985), stand for the proposition that under traditional principles of trust law, a trustee has only those duties imposed and powers conferred by the trust documents and those implicit powers necessary or appropriate for carrying out the purposes of the trust. Here, the Sixth Circuit failed to consider or discuss this established precedent that trust law principles should be applied to determine how to distribute property coming into possession of a trustee.

As explained in more detail below, courts around the country are applying a variety of different legal principles and reaching conflicting conclusions regarding the rightful owner of demutualization proceeds. The decision of the Sixth Circuit in this case will only cause further confusion and conflict among the courts of appeals. This Court should resolve the Question Presented to ensure uniform application of the law applicable to the appropriate distribution of demutualization proceeds received by benefit plans.

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[1] As used herein, "Southwire" shall refer to Southwire Company and to its current and former subsidiaries and affiliates, unless the context plainly requires otherwise.

## STATEMENT OF THE CASE

### A. Factual Background

#### *1. Nature of the Southwire Plan*

National-Southwire Aluminum Company, then a subsidiary of Southwire, established the Southwire Plan for the benefit of its eligible employees, effective July 1, 1970. App. 3a. When ERISA was enacted, the Southwire Plan constituted a "defined benefit plan" within the meaning of Section 3(35) of ERISA, 29 U.S.C. § 1002(35). Section 403 of ERISA required that the assets of the Southwire Plan be held in trust. Southwire arranged for Irving Trust to serve as trustee for the Plan. App. 3a. In accordance with Section 404(a)(1)(D) of ERISA, 29 U.S.C. § 1104(a)(1)(D), Irving Trust as trustee of the Plan, held the Plan assets pursuant to the terms of the Plan, the governing trust instrument. BNY, Plaintiff in this interpleader action, is the successor to Irving Trust.

The Southwire Plan was a "defined benefit" pension plan, providing a fixed amount of monthly retirement income for eligible employees and their beneficiaries in accordance with the Plan's benefit formula. App. 3a. Southwire bore the entire cost of the Southwire Plan by making periodic contributions in amounts sufficient to meet the applicable funding requirements of Section 412 of the Internal Revenue Code of 1986, as amended ("Code"), 26 U.S.C. § 412, and Section 302 of ERISA, 29 U.S.C. § 1082. The employees made no financial contributions to the Southwire Plan. App. 32a. Pursuant to Article VII of the Southwire Plan and Title I, Subtitle A, Part 3 of ERISA, Southwire bore the sole risk and obligation of ensuring that the Southwire Plan could pay all accrued benefits to the participants and their beneficiaries. If insufficient assets had been available to satisfy the benefit liabilities accrued under the Southwire Plan, Southwire

would have been solely responsible for providing additional sums to meet the benefit obligations. App. 32a.

### 2. *Termination of the Southwire Plan and Purchase of Annuity Contracts*

Southwire maintained and funded the Southwire Plan continuously from 1970 until 1986. On October 24, 1986, Southwire announced to affected participants that the Southwire Plan would be terminated effective December 31, 1986.[2] App. 33a. On November 17, 1986, Southwire notified the Pension Benefit Guaranty Corporation that it intended to terminate the fully-funded Southwire Plan pursuant to a "standard termination" under Section 4041(b) of ERISA, 29 U.S.C. § 1341(b). When a defined benefit pension plan voluntarily terminates in a standard termination, the plan sponsor is required to purchase an "irrevocable commitment" from an insurance company to satisfy all benefit liabilities under the plan. In accordance with this requirement, Irving Trust, as trustee for the Southwire Plan, purchased irrevocable commitments from Prudential Insurance Company of America ("Prudential") in the form of group annuity contracts GA-5542 and GA-5543 (the "Group Annuity Contracts"), at a total cost of $7,908,495. App. 4a. In so doing, Irving Trust completely satisfied the Southwire Plan's liabilities to participants as well as its fiduciary obligation to the participants under the trust and the provisions of ERISA.

The Group Annuity Contracts expressly state that the contract-holder for each contract is "Irving Trust Company, as Trustee" for National-Southwire Aluminum Company

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[2] After the Southwire Plan's termination, Southwire established a new defined benefit pension plan for participants, effective January 1, 1987, ensuring that eligible employees could continue to accrue pension benefits going forward.

Pension Plan." App. 33a. Individual certificates issued to the Annuitants by Prudential ("Certificates") also state that the contract-holder of the Group Annuity Contracts was "Irving Trust, as Trustee" for the Southwire Plan.[3]

The Southwire Plan expressly provided that any surplus funds remaining after the termination and the satisfaction of its benefit obligations were to be returned to Southwire. Specifically, as permitted by Section 4044(d)(1) of ERISA, 29 U.S.C. § 1344(d)(1), Section 9.2 of the Southwire Plan states:

> Any funds remaining after the satisfaction of all liabilities with respect to Participants, retired Participants, vested and terminated Participants, and beneficiaries under the Plan shall be returned to NSA [*i.e.*, to Southwire].

App. 50a.

After its purchase of the Group Annuity Contracts, Irving Trust held all remaining assets in the Southwire Plan in trust for the only remaining "beneficiary" under the Southwire Plan's terms – Southwire, the "settlor." After the purchase of the Group Annuity Contracts, all known remaining assets in the Southwire Plan, except those necessary to cover the trustee's administrative expenses, reverted to Southwire pursuant to Section 9.2 of the Plan, as

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[3] No party has questioned the legality of Irving Trust's satisfaction of the Southwire Plan's benefit obligations through the purchase of group annuity contracts from a mutual insurance company – as opposed to individual insurance contracts from a stock insurance company.

permitted and required by federal law (29 U.S.C. §§ 1104(a)(1)(D) and 1344(d)(1)).[4] App. 33a.

### *3. The Demutualization of Prudential*

On December 15, 2000, the Prudential Board of Directors adopted a Plan of Reorganization under Chapter 17 of Title 17 of the New Jersey Revised Statutes, which included a plan to convert Prudential from a mutual insurance company to a stock company through a process known as "demutualization." App. 5a. As a mutual life insurance company, Prudential had no shareholders. Instead, Prudential was owned by the contract holders of Prudential policies and annuity contracts, with rights as to voting and participation in any distribution of the surplus of Prudential. As part of the demutualization process, and pursuant to applicable New Jersey law, a mutual company must provide shares of stock in exchange for the ownership interests of policyholders and contract holders in the mutual company. App. 5a.

As required by its demutualization plan, Prudential issued 35,199 shares of stock to BNY (as successor to Irving Trust, the Southwire Plan's trustee and the designated contract holder of the Group Annuity Contracts), representing its ownership interest in Prudential attributable to the Group Annuity Contracts purchased upon termination of the Southwire Plan. App. 5a. BNY received this stock as successor to "Irving Trust, as Trustee" of the Southwire Plan. The shares of stock issued by Prudential had no effect on the

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[4] Because the Sixth Circuit found the Annuitants were entitled to the surplus Demutualization Proceeds in the trust underlying the terminated Southwire Plan, and found Century's claim to the Demutualization Proceeds to be moot, this Statement of the Case will not detail the provisions of Southwire's subsequent sale of its Hawesville plant to Century.

Group Annuity Contracts, and the benefit obligations to the former participants and beneficiaries of the Southwire Plan remained fully satisfied by the Group Annuity Contracts.

Upon receipt of conflicting claims for the Demutualization Proceeds, BNY sold the shares of Prudential stock and deposited $1,357,703.69 into the registry of the district court. App. 43a.

## B. Procedural History

### *1. District Court Proceedings*

BNY filed this interpleader action (pursuant to 28 U.S.C. § 1335 and Fed. R. Civ. P. 23) to resolve the conflicting claims as to the ownership of the Demutualization Proceeds received from Prudential among the parties to this action: (i) Southwire, the plan sponsor; (ii) the Annuitants, participants in the Southwire Plan and third-party beneficiaries under the Group Annuity Contracts; and (iii) Century, which acquired Southwire's Hawesville, Kentucky aluminum smelting plant and its operating assets in 2001, fifteen years after the Plan's termination. App. 5a.

The district court adjudicated the parties' conflicting claims in two phases. In phase one, the district court determined that, as between Southwire and the Annuitants, Southwire was entitled to the Demutualization Proceeds based on fundamental principles of trust law, the express reversion provision in the pension plan, and the terms of the Group Annuity Contracts. App. 39a-40a. The district court noted that BNY came into possession of the Demutualization Proceeds in its capacity as the trustee of a terminated pension plan and trust that unequivocally provided for the reversion to Southwire of any funds remaining after the satisfaction of all liabilities to the Southwire Plan's participants. App. 40a.

In addition, the involved pension trust was funded solely by contributions from Southwire. The Annuitants themselves neither made, nor were permitted to make, any contributions to the plan. App. 32a. The purchase of the two Group Annuity Contracts entirely satisfied the trust's pension liabilities to the Annuitants, both pursuant to the terms of the plan itself and applicable federal law. As such, the district court concluded that the Demutualization Proceeds "should be returned to the settlor of the trust pursuant to trust law and the terms of the document which created the trust" and granted Southwire's motion for partial summary judgment. App. 40a.

In the second phase, the district court determined that Southwire's claim to the Demutualization Proceeds was superior to Century's and again granted Southwire's motion for partial summary judgment. App. 23a.

### *2. The Sixth Circuit Proceedings*

The Annuitants and Century appealed, and the two appeals were consolidated. A divided panel of the Sixth Circuit reversed, holding that the Annuitants were entitled to the Demutualization Proceeds, and dismissed Century's appeal as moot. The Sixth Circuit majority failed to correctly apply this Court's decision in *Hughes Aircraft* holding that plan participants in a defined benefit pension plan have only a right to their accrued benefits and are not entitled to the plan's surplus assets. 525 U.S. at 440-41. The majority decision results in the Annuitants receiving their accrued benefits *plus* the Demutualizaton Proceeds.

In addition, although the Group Annuity Contracts expressly designated Irving Trust as contract holder of the annuity contracts in its capacity as "trustee" of the Southwire Plan, the Sixth Circuit majority discounted the significance of that fact, as well as the legal rights and responsibilities

imposed in connection with a trustee's service in that capacity. Instead, the majority incorrectly concluded that because Southwire was not a party to, or a beneficiary of, the contracts, the parties must have intended that the Annuitants would become the contract holders in the event Irving Trust stepped down. App. 11a-12a. Based on this conclusion, the majority held that the Annuitants were entitled to the Demutualization Proceeds. App. 3a.

The majority opinion also reasoned that because the Group Annuity Contracts were silent regarding demutualization, RESTATEMENT (SECOND) OF CONTRACTS § 204 could be used to supply a missing term to the Group Annuity Contracts entitling the Annuitants to the Demutualization Proceeds. App. 14a-15a. Finally, the majority concluded that that the nature of demutualization entitled the Annuitants to the Demutualization Proceeds. App. 15a-18a.

In her dissent, Judge Batchelder disagreed with the majority's reasoning and its conclusion, noting that the majority opinion's decision was "foreclosed" by this Court's decision in *Hughes Aircraft*. Recognizing the error in the majority's legal approach and analysis, Judge Batchelder concluded: "I would affirm the decision of the district court and hold that this money represents surplus assets of a defined benefit plan, which was paid into the trust by the employer and must be returned to the employer as trust settlor." App. 19a.

## REASONS FOR GRANTING THE WRIT

This Court should grant review for at least three reasons.

***First***, as noted in Judge Batchelder's dissenting opinion, the outcome adopted by the majority opinion "is

foreclosed by" this Court's decision in *Hughes Aircraft*. App. 19a. In *Hughes Aircraft*, this Court held that plan participants in a defined benefit pension plan have only a right to a certain defined level of benefits (*i.e.*, "accrued benefits") and have no claim or entitlement to a plan's surplus assets. *Id.* at 440-41. The majority failed to follow this Court's direction in *Hughes Aircraft*, instead crafting multiple alternative theories to award the Annuitants amounts that exceed the accrued benefits to which they are legally entitled. This outcome is contrary to a central proposition of *Hughes Aircraft*.

***Second***, the majority opinion also conflicts with decisions of the D.C. Circuit and the Seventh Circuit. Those courts have held that the individual insureds under an employee benefit plan funded through a group insurance policy have no ownership interest in demutualization proceeds received after the demutualization of the insurance company which underwrote the plan. Instead, the demutualization proceeds must be distributed in accordance with the plan and related documents. *See Stewart*, 471 F.3d at 177;[5] *RLJCS Enters.*, 2007 WL 1262010 at *5.

***Third***, the majority decision conflicts with and overlooks this Court's precedent establishing that trust law principles (which served as the basis for the district court's conclusion that Southwire was the rightful owner of the Demutualization Proceeds) dictate the disposition of stock coming into a trustee's possession in the context of a benefit plan.

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[5] The D.C. Circuit in *Stewart* distinguished the Sixth Circuit's majority opinion in this case in two ways, noting that the group life insurance plan was ongoing and that the participant had not disputed that the plan administrator was the contract-holder. While Southwire acknowledges these factual differences, they are immaterial to the outcome of this case, for the reasons explained *infra*.

The Sixth Circuit's decision thus is inconsistent with this Court's holding in *Hughes Aircraft* and also creates a conflict among the Circuits concerning the proper legal principles applicable to a determination of the rightful owner of demutualization proceeds under the circumstances.

## I. THE MAJORITY DECISION BELOW IS INCONSISTENT WITH *HUGHES AIRCRAFT.*

The majority decision erroneously concludes, in conflict with this Court's decision in *Hughes Aircraft*, that the Annuitants are the rightful owners of the Demutualization Proceeds. In *Hughes Aircraft*, this Court held that plan participants in a defined benefit pension plan "have a nonforfeitable right only to their 'accrued benefit,'" and nothing more. 525 U.S. at 439-41. This Court in *Hughes Aircraft* also noted the importance of the distinction between a "defined contribution" and a "defined benefit" pension plan in determining the rights of plan participants. *Id.* at 439.

A defined contribution plan "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account." *Id.* (quoting Section 3(34) of ERISA, 29 U.S.C. § 1002(34). Under a defined contribution plan, a "beneficiary is entitled to whatever assets are dedicated to his individual account." 525 U.S. at 439.

In contrast, a defined benefit plan consists of a general pool of assets and provides each participant a fixed periodic payment upon retirement. *Id.* The benefit plan's actual investment experience, good or bad, has no effect on the employees' benefit entitlement. Participating participants are entitled to their defined level of accrued benefits only and have no interest in any plan surplus. *Id.* at 440-41.

Although the pension plan in *Hughes Aircraft* was ongoing rather than terminated, the facts this Court considered in *Hughes Aircraft* are instructive, and the Court's primary holding is controlling in this case. Faced with a pension plan overfunded in excess of $1 billion, the plan sponsor in *Hughes Aircraft* amended its defined benefit pension plan to eliminate the employee contribution requirement and to institute a new early retirement program and a noncontributory plan structure. Several employees contended that the plan sponsor violated ERISA by using assets from the surplus attributable to the employees' contributions to fund the new noncontributory structure. *Id.*

With respect to a defined benefit plan, Section 204(c)(2)(B) of ERISA provides that a participant has a nonforfeitable right to the greater of (1) the benefits provided under the plan or (2) an amount derived from the employee's accumulated contributions, determined using an interest rate fixed by statute. 29 U.S.C. § 1054(c)(2)(B). Under this structure, this Court concluded that "plan members generally have a nonforfeitable right only to their 'accrued benefit,' so that a plan's actual investment experience does not affect their statutory entitlement." *Hughes Aircraft*, 525 U.S. at 440. Furthermore, the Court held that "[s]ince a decline in the value of a plan's assets does not alter accrued benefits, members similarly ***have no entitlement to share in a plan's surplus*** – even if it is partially attributable to the investment growth of their contributions." *Id.* at 440-41 (emphasis added). In sum, so long as participants under a defined benefit plan receive their accrued benefit, they have no entitlement to any further benefit from the plan–even funds generated through investment of their own contributions.

Here, despite its conclusion to the contrary, the Sixth Circuit majority opinion cited no authority for the proposition that the Annuitants are entitled to anything more than their accrued benefits under the Southwire Plan. The

majority disregarded *Hughes Aircraft* on the ground that this Court's decision involved an ongoing plan, rather than a terminated plan. However, there is no principled basis for the majority's refusal to apply *Hughes Aircraft*. It is undisputed that the Group Annuity Contracts designated Irving Trust as the contract holder in its capacity as Trustee of the Southwire Plan, and that BNY came into possession of the Demutualization Proceeds in its capacity as successor-in-interest to the trustee of the Southwire Plan. Because the contract holder of the Prudential annuity contracts served solely in its capacity as trustee of the Southwire Plan, it makes no difference whether the Plan was ongoing or terminated. In either event, the provisions of the Southwire Plan continue to govern the relationship among the trust settlor, trustee, and participants, and dictates the rights and obligations of the trustee with respect to disposition of any funds coming into the trustee's possession, including the Demutualization Proceeds.

The Sixth Circuit majority also disregarded the important consideration of which party paid for the principal giving rise to the Demutualization Proceeds. Southwire sponsored a defined benefit plan. The Plan was financed entirely by Southwire – with no contributions from the Annuitants. Plan assets were used to purchase the Group Annuity Contracts from Prudential to fully fund the participants' accrued benefits. Therefore, unlike the plaintiffs in *Hughes Aircraft*, the Annuitants have no argument that any money belonging to them was used to purchase the group annuities which created the Demutualization Proceeds at issue. But for the use of Southwire's contributions (in excess of $7 million) to purchase the Group Annuity Contracts, no Demutualization Proceeds would exist. Moreover, through the annuities provided under the Group Annuity Contracts, the Annuitants undisputedly received everything to which they are entitled

under the Southwire Plan and ERISA. Based on this Court's decision in *Hughes Aircraft*, they are entitled to nothing more.

The decision below unquestionably provides the Annuitants with more than their accrued benefits under the defined benefit Southwire Plan. This Court should grant review and reject the Sixth Circuit's attempt to create an exception to *Hughes Aircraft*, which compels the conclusion that the Annuitants are not entitled to the Demutualization Proceeds.

## II. THE COURTS OF APPEALS ARE IN CONFLICT ON THE PROPER LEGAL ANALYSIS TO USE IN DETERMINING THE RIGHTFUL OWNER TO DEMUTUALIZATION PROCEEDS FLOWING FROM A BENEFIT PLAN.

As mutual insurance companies have demutualized, courts around the country have wrestled with disputes over the ownership of demutualization proceeds, including from the demutualization of Prudential and particularly when benefit plans are involved. *See, e.g., Daniels v. Bursey*, 313 F. Supp. 2d 790 (N.D. Ill. 2004)(evaluating RICO, ERISA and fraud claims related to demutualization). The lesson learned from these cases is not whether the employer or the employee "wins," but what legal principles courts should use in their analysis. The courts that have determined the ownership of demutualization proceeds when benefit plans are involved have focused on the nature of the benefit plan in question and the concept of surplus plan assets. The proper framework involves (i) analyzing the applicable plan documents regarding how plan assets and surplus funds are

to be treated;[6] and (ii) analyzing both the assets of the benefit plan and the ownership of demutualization proceeds under ordinary notions of property rights.[7]

Thus, in any demutualization scenario, a court must review plan documents and any other legal agreement among the contesting parties. The determination of ownership depends on the corporate structure of a given plan and the terms of the relevant documents. The Sixth Circuit's majority decision, however, ignored the plan documents, the nature of the plan as a defined benefit plan, and the key issue of which party paid for the Group Annuity Contracts, creating a conflict among the Circuits regarding the applicable legal principles to be used in determining the appropriate disposition of demutualization proceeds. The majority decision conflicts with the analysis used by other courts that have addressed this issue.

For example, in *Stewart*, the National Education Association ("NEA"), the plan administrator of the National Education Association Members Insurance Trust ("NEA Trust"), sponsored a voluntary members insurance plan providing benefits in the event of death, accident, sickness,

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[6] *See RLJCS Enterprises, Inc. v. Prof'l Benefit Trust, Inc.*, 438 F. Supp. 2d at 903, 909-10 (N.D. Ill. 2006), *aff'd*, -F.3d-, 2007 WL 1262010 at *2-3 (citing *Chicago Truck Drivers, Helpers & Warehouse Workers Union (Indep.) Health & Welfare Fund v. Local 710, Int'l Bhd. of Teamsters, No. 02-C-3115*, 2005 WL 525427 (N.D. Ill. Mar. 4, 2005)); *Stewart v. Nat'l Educ. Assoc.*, 404 F. Supp. 2d 122, 131, 133 (D.D.C. 2005), *aff'd*, 471 F.3d 169 (D.C. Cir. 2006) (explaining when proceeds are plan assets rather than employer assets per the guidance of Department of Labor letter opinions).

[7] *RLJCS Enterprise*, 438 F. Supp. 2d at 910 (citing Dep't of Labor Advisory Op. No. 92-02A, at 2 (Jan. 17, 1992); Dep't of Labor Advisory Op. No. 2001-02A, at 5-6, n.2 (Feb. 15, 2001)); *accord Stewart*, 404 F. Supp. 2d at 130-3.

disability or other occurrence affecting participants or their families. 471 F.3d at 171. The NEA Trust entered into a group life insurance contract with Prudential. The participants paid premiums to the NEA Trust, which in turn made group payments to Prudential. As described above, Prudential eventually demutualized, and the NEA Trust received approximately $17 million in demutualization proceeds. The NEA amended the NEA Trust to permit the demutualization proceeds to be used for the benefit of all participants, whether or not they participated in the Prudential group insurance contract. Stewart brought a putative class action lawsuit claiming that participants had individual rights to the demutualization proceeds. *Id.* at 172.

The D.C. Circuit first determined that ERISA applied to the participant's complaint because of its relation to an employee benefit plan, and that ERISA preempted any state law causes of action asserted in the complaint. Stewart also brought two claims under ERISA. *Id.* at 173. First, Stewart sought benefits under section 502(a)(1) of ERISA (29 U.S.C. § 1132(a)(1)). The district court dismissed this claim, finding that Stewart failed to identify a specific plan term that conferred the benefit in question. *Id.* at 174. Although Stewart conceded that the NEA Trust was the policyholder, he argued that inherent in a policy issued by a mutual company is the right to share in the surplus of the company. In light of these structural assumptions about mutual insurance companies, Stewart claimed an entitlement to the demutualization proceeds as a benefit under the involved employee benefit plan. *Id.* In support of this argument, Stewart relied upon *Ruocco v. Bowman Eichler, Hill, Richards, Inc.*, 903 F.2d 1232 (9th Cir. 1990), which lent support to the equitable notion that premium-paying participants deserve the proceeds of demutualization more than the sponsoring employer. However, the D.C. Circuit found that *Ruocco* did not stand for the proposition that

"premium-paying employees are entitled to a surplus more than a plan on behalf of all employees." 471 F.3d at 174.

Stewart also argued that he lost the "benefit" of converting his coverage under the group contract to an individual insurance policy upon the demutualization. The D.C. Circuit found no basis for this claim because, although the demutualization extinguishes the membership rights of a policyholder, it does not affect, much less terminate, the underlying insurance policy. Accordingly, the D.C. Circuit affirmed the dismissal of Stewart's claim for "benefits." *Id.* at 175-76.

In the context of this case, *Stewart* stands for several significant propositions. First, *Stewart* distinguishes between the rights of beneficiaries and the rights of a contract holder under a group insurance contract issued by a mutual insurance company. *Stewart* held that the designated contract holder (the NEA Trust) had the direct entitlement to the demutualization proceeds, not the individual participants insured under the group insurance contracts.[8] Furthermore, *Stewart* recognized that the participants' rights to the demutualization proceeds were determined by the terms of the governing instrument, the NEA Trust. The terms of the NEA Trust explicitly provided that a surplus could be used to benefit all participants in the NEA Trust, not only those who pay premiums to the involved insurer. The appeals court in *Stewart* did not attempt to re-write the terms of either the group insurance contract or the employee benefit plan by inserting implied or judicially created terms. Rather, the D.C. Circuit followed the terms of the governing documents.

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[8] Significantly, the court in *Stewart* reached this conclusion despite the fact that the participants themselves paid all of the premiums for the purchase of the policies. In the present case, the Annuitants made no payments.

Southwire argued before the district court that BNY's status as contract holder may have reverted to Southwire pursuant to the Southwire Plan's reversion clause, thereby entitling Southwire directly to the Demutualization Proceeds. In response to this argument, the Annuitants themselves acknowledged that "[t]he most straightforward reading of the record is that Irving Trust Company continued on as the contract holder continuously, with a change in name to BNY, up to Prudential's distribution of demutualization proceeds and the filing of this lawsuit." App. 49a. No one argued that the Annuitants became the contract holders or that the parties to the contracts intended such a result. In the end, the court in *Stewart* found that the contract holder, the NEA Trust, was entitled to the demutualization proceeds, which it could dispose of pursuant to the governing trust instrument. This same reasoning should apply to BNY's receipt of Demutualization Proceeds from Prudential and this Court should grant certoriari in this case to resolve the conflict which now exists concerning the proper legal principles applicable in determining the owner of demutualization proceeds flowing from benefit plans.

The decision below also conflicts with *RLJCS Enterprises*, – F.3d –, 2007 WL 1262010. There, the Seventh Circuit enforced the terms of the governing trust instrument to determine the appropriate disposition of demutualization proceeds. Professional Benefit Trust, a multiple employer welfare arrangement, offered various welfare benefits, including death benefits, to the employees of participating employers. Under the terms of the governing trust instrument, upon withdrawal from the arrangement, participating employees would be entitled to their pro rata share of net asset value. This amount specifically excluded the surplus account. Professional Benefit Trust funded death benefits for participant-employees through several group insurance contracts. *Id.* at

*1. Two of these group insurance contracts were with insurers who demutualized. As the designated policyholder on the group annuity contracts, Professional Benefit Trust received the demutualization proceeds. An employer and some of the participant-employees brought a action against Professional Benefit Trust claiming they were entitled to distributions of demutualization as surplus assets. *Id.*

The Seventh Circuit held that, as the designated policyholder, only Professional Benefit Trust had any property right to the demutualization proceeds. *Id.* at *4. The Seventh Circuit also enforced the terms of the governing trust instrument, finding that the trust agreement allowed Professional Benefit Trust to treat the demutualization proceeds as surplus assets and the participant-employees did not prevail in their claim for surplus assets from the plan. *Id.* *RLJCS Enterprises* thus stands for the proposition that when a trustee for an employee benefit plan receives demutualization proceeds as the policy holder or contract holder of a group insurance contract, the disposition of the demutualization proceeds is governed by the governing trust instrument.

In sum, both the Seventh Circuit and the D.C. Circuit followed principles of trust law and applied the terms of the governing trust instrument to settle disputes regarding the disposition of demutualization proceeds. *Stewart*, 471 F.3d at 169; *RLJCS Enters.*, 2007 WL 1262010.

The Sixth Circuit, in stark contrast to these two decisions, (i) flatly ignored the designation of a contract holder and the terms of the governing trust instruments regarding reversion of surplus funds; and (ii) considered only the Group Annuity Contracts, and in doing so, resorted to vague notions of "community standards of fairness" under Section 204 of the Restatement (Second) of Contracts to add judicially created terms, and reached a result directly

contrary to the express provision in the Southwire Plan that any surplus funds be returned to Southwire. The legal principles, analysis and conclusion reached by the Sixth Circuit are markedly different from, and in conflict with, those applied by other Courts of Appeals to determine the disposition of demutualization proceeds. Accordingly, this Court should review and clarify the standards to be applied in demutualization cases.

## III. THE MAJORITY DECISION BELOW ERRONEOUSLY IGNORED THIS COURT'S BINDING PRECEDENT CONCERNING PRINCIPLES OF TRUST LAW GOVERNING A TRUSTEE'S DUTIES AS TO THE DISTRIBUTION OF FUNDS COMING INTO ITS POSSESSION.

*Hughes Aircraft* and other decisions of this Court discussed *supra* on page 4, stand for the proposition that common law trust principles should be applied to determine how to distribute benefit plan assets or surplus. The Sixth Circuit below, however, disregarded this directive and instead looked only to the language of the terms of the annuity contracts to determine the owner of the demutualization proceeds.

The Sixth Circuit majority attempted to overcome its conflict with *Hughes Aircraft* by reasoning that, because the Southwire Plan was terminated before the Demutualization Proceeds came into existence, the funds were not "plan assets" or "plan surplus" and therefore, this Court's holding in *Hughes Aircraft* does not apply. In doing so, however, the majority decision overlooks, as the district court properly recognized, that even though the Southwire Plan had been terminated, "it was still only a trust that Southwire created for the benefit of its employees." App. 40a.

As this Court recognized in *Hughes Aircraft*, employers are generally free under the law to amend, modify or terminate welfare plans. 525 U.S. at 443. In doing so, their actions "are analogous to the settlors of a trust." *Id.* citing *Curtiss-Wright Corp.*, 514 U.S. at 78. In *Spink*, *supra*, this Court held that this rule applies equally to pension benefit plans, such as the one here in issue. 517 U.S. at 891. Because Southwire acted as the settlor of a trust in terminating the Southwire Plan, and because BNY received the proceeds in its capacity as successor-trustee to the Plan, the decision as to who is entitled to the Demutualization Proceeds should be governed by ordinary trust principles.

The Group Annuity Contracts here expressly identify the "contract holder" as "Irving Trust Company, as Trustee for National-Southwire Aluminum Company Pension Plan." App. 33a. The majority decision acknowledges that "BNY received the [Demutualization Proceeds] as successor-in-interest to the former trustee of the [Southwire] Pension Plan." App. 5a. Yet, the majority decision then proceeds with an analysis that completely overlooks the trustee capacity in which BNY received the Demutualization Proceeds and the governing principles of trust law.

Instead, the majority decision starts its analysis with the erroneous assumption that the Irving Trust withdrew as "contract holder" of the Group Annuity Contracts. Based on this erroneous assumption, the majority decision then looks to the language of the Group Annuity Contracts and surrounding circumstances to determine the "intent" of the parties and to name the Annuitants as successor contract holders. In doing so, the majority decision, without explanation, disregards the fact that the Irving Trust held the position of contract holder, as a direct result of its capacity as "Trustee" of the Southwire Plan. Moreover, the majority's determination of the "intent" of the parties is directly contrary to the only evidence of "intent" contained in the

pertinent documents and the record (*i.e.*, the designation of Irving Trust as contract holder in its capacity as trustee of the Plan, and the Plan's express provision that all funds remaining after satisfaction of liabilities to the Annuitants revert to Southwire).

Ordinary trust principles established by this Court's precedent dictate that in administering a trust, a trustee has only those duties imposed or powers conferred by the trust document, along with any implied powers necessary to carry out the purpose of the trust. *See Varity Corp.*, 516 U.S. at 502; *Bruch*, 489 U.S. at 112; *Cent. Transp., Inc.*, 472 U.S. at 570. Fiduciary duties under ERISA "draw much of their content from the common law of trusts." *Varity Corp.*, 516 U.S. at 502. Under ordinary trust law, to administer a trust is to perform the duties imposed, or exercise the powers conferred, by the trust document. *Id.*

Applying these principles of the common law of trusts, the extent of the Annuitants' interests in any assets held by BNY in its capacity as successor to the Plan's trustee depends upon the manifestations of Southwire's intent as the trust's settlor – an intent that can be ascertained from the plain language of the Southwire Plan which provides for the reversion of surplus funds. *See, e.g., Clay v. Crawford*, 183 S.W.2d 797, 804 (Ky. 1944) (determination of the parties' intent is to be obtained "from the language employed ..."). Notably, the Southwire Plan provides for reversion of "any funds." For this reason, the district court correctly held that the Demutualization Proceeds revert to Southwire, which created and solely funded the trust which purchased the Group Annuity Contracts. *See* App. 40a.

Accordingly, this Court should grant review of the majority decision and hold that the principles of trust law established by this Court determine the rights of a settlor that has established a trust to fund an employee benefit plan.

## CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Court of Appeals' Opinion filed November 22, 2006 ..... Appendix A

Court of Appeals' Order filed March 26, 2007 ..Appendix B

District Court's Opinion filed August 10, 2005 .Appendix C

District Court's Opinion filed September 28, 2004 ..... Appendix D

Statutory Provisions ..... Appendix E

Excerpt from Class Defendants' Memorandum In Opposition to Southwire's Motion for Summary Judgment ..... Appendix F

Section 9.2 of the National-Southwire Aluminum Company Pension Plan..... Appendix G

**APPENDIX A**

**United States Court of Appeals**
**FOR THE SIXTH CIRCUIT.**

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Nos. 05-6390, 05-6456

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BANK OF NEW YORK, as former Trustee for National-Southwire Company Pension Plan, Plaintiff,
Southwire Company
Defendant-Appellee,

v.

John Stephen JANOWICK, Gary Erwin, and Merl Kannapel, on behalf of themselves and as the representatives of a class of current and deferred annuitants of Prudential Group Annuity Contracts GA 5543 and GA 5542,
Defendants-Appellants,

Century Aluminum Company,
Defendant-Appellant.

ARGUED: Sept. 18, 2006.

DECIDED AND FILED: Nov. 22, 2006.

Before: BATCHELDER and MOORE, Circuit Judges; COHN, District Judge.

BATCHELDER, J. delivered a separate dissenting opinion.

## OPINION

MOORE, Circuit Judge.

When an insurance company's reorganization yields a pot of money that no one expected or even envisioned, who receives the proceeds? In short, that is the issue this case requires the court to resolve.

Bank of New York ("BNY") filed this interpleader action to resolve conflicting claims to stock it received from Prudential Insurance Company of America's demutualization, i.e., its reorganization from a mutual insurance company to a stock company. BNY received the stock as successor-in-interest to the former trustee of the National-Southwire Aluminum Company ("NSA") Pension Plan ("NSA Plan" or "Plan"). The Plan terminated in 1986, and the trustee used the Plan's assets to purchase two group annuity contracts, which satisfied the Plan's ERISA obligations to the employees.

The claimants to the stock are a class of employees ("Employees") of the now-defunct NSA (represented by Defendants-Appellants Janowick, Erwin, and Kannapel), Defendant-Appellee Southwire Company ("Southwire") (the parent company of the former NSA), and Defendant-Appellant Century Aluminum Company ("Century") (the purchaser of the former NSA's assets). The district court addressed the claims in two phases, first concluding via summary judgment that Southwire's claims were superior to those of the Employees, and next concluding that Southwire's claims trumped Century's. The Employees and Century both appeal.

Regarding the Employees' appeal, we **REVERSE** the district court's grant of summary judgment to Southwire, as

we conclude that both Kentucky law and the nature of demutualization compel the conclusion that the Employees are entitled to the proceeds, and **REMAND** for further proceedings consistent with this opinion. As to Century's appeal, we **VACATE** the district court's judgment and **DISMISS** Century's appeal as moot, as we conclude that Century could not have purchased from Southwire that which Southwire never owned.

## BACKGROUND

### The Pension Plan

In 1970, NSA created the Plan as a defined-benefit pension plan for the Employees, who worked at an aluminum smelting plant NSA operated in Hawesville, Kentucky. Under a defined-benefit plan, "the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Ala. Power Co. v. Davis*, 431 U.S. 581, 593 n. 18, 97 S.Ct. 2002, 52 L.Ed.2d 595 (1977). Thus, NSA paid contributions to the Plan through a funding agent, and the Plan held in trust and managed these funds on behalf of the Employees.

The Plan became governed by ERISA upon ERISA's enactment in 1974. In December 1986, NSA terminated the Plan. At that time, Irving Trust Company ("Irving") was the designated Plan trustee. Consistent with ERISA's requirements, *see* 29 U.S.C. § 1341(b), Irving purchased two group annuity contracts (nos. GA-5542 and GA-5543) from the Prudential Insurance Company of America ("Prudential") for the benefit of the Employees. These annuity contracts constitute an "irrevocable commitment[ on behalf of Prudential] to provide all benefit liabilities under the plan." 29 U.S.C. § 1341(b)(3)(A)(i). *See also* 29 C.F.R. § § 4001.2, 4041.28(c)(1), 4041.28(d)(1).

After Irving bought the annuity contracts (which cost approximately $7 million) from Prudential, some funds remained in the trust. Consistent with ERISA, the governing documents of the NSA Plan provided that such surplus funds could revert to NSA once the trustee fully satisfied the plan's obligations to its beneficiaries. *See* 29 U.S.C. § 1344(d)(1); Joint Appendix ("J.A.") at 157-58 (NSA Plan § 9.2). NSA received approximately $11.5 million under this provision. After all of the Plan's assets were distributed, Irving's status as trustee terminated sometime in 1987. At that point, the Plan was defunct.

**Subsequent Transactions**

Starting in the early 1990s, NSA underwent a series of corporate transactions with other companies under the umbrella of NSA's parent corporation, Southwire. In August 2000, Century agreed to purchase from Southwire the Hawesville plant and assets associated with its business.

**Prudential's Demutualization**

At the time Irving purchased the annuity contracts, Prudential was organized as a mutual insurance company under the laws of New Jersey. "A mutual insurance company has no shareholders and is instead owned by its policyholders." James A. Smallenberger, *Restructuring Mutual Life Insurance Companies: A Practical Guide Through the Process*, 49 Drake L.Rev. 513, 516 (2001). Those who purchase policies from mutual insurance companies receive both membership interests (e.g., the right to elect directors and the right to receive a proportionate share of the company if it liquidates) and contract rights (i.e., the obligations of the insurance company under the policy). Id. at n. 4.

Prior to 1998, New Jersey did not allow insurance companies to organize as stock companies. J.A. at 476 (NJ Dep't of Banking & Ins. Order No. A01-153 § I.). New Jersey law changed in 1998, and in December 2000, Prudential's board of directors adopted a plan to demutualize, that is, to reorganize from a mutual insurance company to a stock company. The demutualization plan was approved by policyholders in July 2001, and within three months, the New Jersey Insurance Commissioner approved the plan. Id. Prudential's demutualization plan required the new company, Prudential Financial, Inc. ("PFI"), to issue stock to eligible policyholders as consideration for their membership interests in the old company.

In early 2002, PFI issued 35,119 shares of stock to BNY as the successor-in-interest to Irving. The stock was intended to compensate Irving for the loss of membership interests that it held as the contract-holder of the group annuities purchased to terminate the NSA plan. However, BNY denied both that it was the contract-holder and that it was entitled to the stock. Soon, BNY began receiving conflicting demands for the demutualization proceeds when Southwire, the Employees, and Century all asserted entitlement to the stock. To settle these claims, BNY filed its interpleader complaint on February 3, 2003, naming Southwire, the Employees, and Century all as defendants. The district court had jurisdiction under the minimal diversity requirement of the federal interpleader statute because two of the claimants are diverse, as the Employees are Kentucky residents and Southwire is organized as a Delaware corporation. 28 U.S.C. § 1335(a); *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 530-31, 87 S.Ct. 1199, 18 L.Ed.2d 270 (1967).

## Procedural History

The district court certified a defendant class consisting of the Employees and dismissed BNY from the case, leaving the three claimants as parties to the litigation. It also granted BNY permission to sell the stock and ordered it to deposit the proceeds with the court. Accordingly, BNY deposited approximately $1.3 million with the district court.

The district court proceeded in two phases to settle the claimants' dispute. First, it pitted Southwire against the Employees to determine which of those two parties had the better claim to the demutualization proceeds. On September 29, 2004, it granted summary judgment to Southwire and denied summary judgment to the Employees.

Next, the district court decided whether Century's claim to the proceeds was superior to Southwire's. On August 10, 2005, it granted summary judgment to Southwire and denied summary judgment to Century.

Both the Employees and Century appealed, and their appeals were consolidated for briefing and submission. We have jurisdiction over the Employees' and Century's appeals from the district court's final judgment under 28 U.S.C. § 1291.

## STANDARD OF REVIEW

We review de novo a district court's order granting summary judgment, *DiCarlo v. Potter*, 358 F.3d 408, 414 (6th Cir.2004), and will affirm a grant of summary judgment "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). In reviewing the district

court's decision to grant summary judgment, we must view all evidence in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).

## ANALYSIS

The Employees argue that Southwire never had a right to the demutualization proceeds, and Century argues that it purchased the right to the proceeds when it bought the Hawesville plant from Southwire in 2000. Because we conclude that the Employees are correct, Southwire never could have transferred the interest in the demutualization proceeds to Century.

Ultimately, we conclude that the Employees are entitled to the demutualization proceeds for three separate reasons. First, we conclude that the terms of the annuity contract compel the conclusion that the Employees are now the contract-holders, and thus entitled to the demutualization proceeds. Second, we conclude that under relevant contract principles, we would supply a term to the annuity contracts under Restatement (Second) of Contracts § 204 entitling the Employees to unforeseen demutualization proceeds. Finally, we consider the nature of demutualization and conclude that Southwire could not have had any claim to the demutualization proceeds because it never held any ownership interest in Prudential.

### Terms of the Annuity Contract

Prudential's demutualization plan entitles "Eligible Policyholders"-i.e., the "owners" of eligible policies and annuity contracts, J.A. at 297 (Reorganization Plan § 1)-to demutualization compensation. J.A. at 318 (Reorganization Plan § 7.1(b)). For group annuity contracts, it defines the designated contract-holders as "owners." J.A. at 312

(Reorganization Plan § 5.3). Here, the annuity contracts designate Irving as the contract-holder "as trustee for [the] National-Southwire Aluminum Company Pension Plan." J.A. at 190, 235. Irving's successor (BNY) claims that Irving's status as contract-holder ceased, presumably when its status as trustee of the NSA Plan terminated in 1988. The demutualization plan does not indicate how shares should be distributed when a policy lacks an owner.[1]

Because the demutualization plan does not resolve the dispute, we turn elsewhere. The Department of Labor ("DOL") has concluded that, in disputes over demutualization proceeds born from an annuity contract purchased to terminate an ERISA plan,[2] the terms of the relevant annuity contracts and state law govern. Dep't of Labor, Office of Pension and Welfare Benefit Programs Op. No.2003-05A, 2003 WL 1901900 (Apr. 10, 2003). Although the DOL's advisory opinion is not binding on us, it is worthy of "some deference." *Christensen v. Harris County*, 529 U.S. 576, 587, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) (quoting *Reno v. Koray*, 515 U.S. 50, 61, 115 S.Ct. 2021, 132 L.Ed.2d 46 (1995)). Interpretive guidance from administrative agencies that is not the product of formal, notice-and-comment rulemaking is entitled to respect "to the extent that th[e] interpretations have the 'power to

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[1] Although no party so argues, the demutualization plan hints that Prudential should have resolved this dispute by invoking its "Resolution Procedures" once BNY disclaimed entitlement to the demutualization consideration. J.A. at 314 (Reorganization Plan § 5.9). The record contains no indication that Prudential did so.

[2] The "final distribution" of a terminating ERISA plan's assets occurs when the administrator "purchase[s] irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or ...otherwise fully provide[s] all benefit liabilities under the plan." 29 U.S.C. § 1341(b)(3); 29 C.F.R. § 4041.28(c). Annuities are an example of such "irrevocable commitments." *See* 29 C.F.R. § 4001.2.

persuade.'" Id. (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 89 L.Ed. 124 (1944)). The Fifth Circuit applied this standard and deferred to similar guidance from the DOL in *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 296 (5th Cir.2000). We conclude that the DOL guidance is persuasive because a membership interest in a mutual insurance company is a precondition to any right to demutualization proceeds, and the annuity contract creates such interests. Regardless of whether the annuity contract contemplates the right to demutualization proceeds, previous documents (e.g., the NSA Plan documents) could not have contemplated such a right, as they neither created nor encompassed membership interests in Prudential.

We conclude that the terms of the annuity contracts entitle the Employees to the demutualization proceeds. The parties do not press this argument in their briefs, but they have provided copies of the annuity contracts in the Joint Appendix. We address the parties' primary argument, whether we should apply Restatement (Second) of Contracts § 204 to supply a missing term to the annuity contracts, infra in Part III.B.

As noted above, Prudential's demutualization plan provides that contract-holders, as "owners" of the contracts, are to receive consideration in the form of stock. The annuity contracts dub Irving the contract-holder, but this provision is of no help because, as noted above, Irving's successor claims that it is no longer the contract-holder. The contracts further provide:

> The Contract-Holder at any time may, with the consent of the Prudential, appoint a successor Contract-Holder.... [H]owever, ... if the Contract-Holder notifies the Prudential

> that it will cease to exist or cease to perform the duties of the Contract-Holder hereunder and no successor Contract-Holder is appointed, this contract shall nevertheless remain in full force and effect ....

J.A. at 195 (Annuity Contract No. 5543 at § 1.10), 242 (Annuity Contract No. 5542 at § 3.7). The record contains no indication that Irving appointed a successor contract-holder or notified Prudential prior to 2002 that it would no longer perform the duties of contract-holder. Notably, the contracts are silent regarding who becomes the successor contract-holder in this situation.

"The primary object in construing a contract ... is to effectuate the intentions of the parties." *Cantrell Supply, Inc. v. Liberty Mut. Ins. Co.*, 94 S.W.3d 381, 384 (Ky.Ct.App.2002). Kentucky courts[3] have long held that in

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[3] The annuity contracts contain choice-of-law provisions selecting New York law. J.A. at 196 (Annuity Contract No. GA-5543 § 1.13), 243 (Annuity Contract No. GA-5542 § 3.11). Notwithstanding these provisions, we believe that, for the following reasons, Kentucky law governs interpretation of the annuity contracts. As explained above, federal jurisdiction arises under the federal interpleader statute's minimal diversity requirement. *See supra* Part I.C. Accordingly, we apply the choice-of-law provisions of the forum state-here, Kentucky. *Republican Nat'l Comm. v. Taylor*, 299 F.3d 887, 890 (D.C.Cir.2002). *See also Andersons, Inc. v. Consol, Inc.*, 348 F.3d 496, 501 (6th Cir.2003) (forum state's choice-of-law provisions apply when federal district court has diversity jurisdiction under 28 U.S.C. § 1332). We have previously determined that under Kentucky law, § 187 of the Restatement (Second) of Conflict of Laws governs contractual choice-of-law provisions. *Wallace Hardware Co. v. Abrams*, 223 F.3d 382, 397 (6th Cir.2000). Section 187 applies the law of the chosen state unless "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice."

so doing, it is proper to consider "the circumstances surrounding the parties, and the object" of the contract, in addition to the contract's language. *Owens v. Ga. Life Ins. Co.*, 165 Ky. 507, 177 S.W. 294, 298 (1915) (quoting *Mitchell v. S. Ry. Co.*, 124 Ky. 146, 74 S.W. 216, 217 (1903)). "Whe[n] a contract is ... silent on a vital matter," it is especially appropriate for courts to consider each of these factors, as well as "the subject matter of the contract." *Cantrell Supply*, 94 S.W.3d at 385.

Here, these factors strongly indicate that the parties to the annuity contracts intended for the Employees to step into Irving's shoes as the contract-holders after Irving withdrew. The purpose of the annuity contracts was to provide pension benefits to which the Employees were entitled under the defunct NSA Plan. Accordingly, the Employees are third-party creditor beneficiaries of the contracts. See *Presnell Const. Managers, Inc. v. EH Const., L.L. C.*, 134 S.W.3d 575, 579 n. 12 (Ky.2004) (quoting *Sexton v. Taylor County*, 692 S.W.2d 808, 810 (Ky.Ct.App.1985)). Other than Prudential, which is not a party to this case, only the Employees have a direct interest in the annuity contracts. By contrast, Southwire is neither a party to, nor a beneficiary of, the contracts. For these reasons, we conclude that the parties' intent in entering the contract was that the Employees

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Restatement (Second) of Conflict of Laws § 187(2)(a), *quoted in Wallace Hardware*, 223 F.3d at 393 n. 9. The present dispute does not involve any parties domiciled in New York, nor any business conducted in New York. Even the purchase of the annuity contracts, in which the trustee to the pension plan of a Delaware corporation purchased annuity contracts from a New Jersey-based insurer for the corporation's Kentucky employees, involves no substantial relationship to New York. The only basis for the parties' choice is that Irving, which is no longer the contract-holder, was based in New York. For these reasons, under § 187(2)(a), Kentucky law applies. Further, both parties' briefs apply Kentucky law, which indicates that the parties agree that Kentucky law should govern our interpretation of the annuity contracts.

would become the contract-holders if Irving were to step down.[4]

**Restatement (Second) of Contracts**

Aside from our analysis of the contract's existing terms, we conclude that the Employees are entitled to the demutualization proceeds under Restatement (Second) of Contracts § 204. The annuity contracts say nothing regarding demutualization, which is not surprising as demutualization was not legal in New Jersey (where Prudential was located) when Irving purchased the annuity contracts from Prudential on the Employees' behalf. Because the annuity contracts do not contain a term regarding entitlement to demutualization proceeds, the Employees urge the court to apply Restatement of Contracts (Second) § 204 to supply the annuity contracts with a missing term. Section 204 states: "When the parties to a ... contract have not agreed with respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court."

Southwire objects, claiming that Kentucky courts have not endorsed § 204. Although no reported case in Kentucky has applied this provision of the Restatement, the Kentucky Supreme Court has applied various other sections of the Restatement, which demonstrates that the Restatement is generally valid authority in Kentucky. *See, e.g., Hargis v. Baize*, 168 S.W.3d 36, 47 (Ky.2005) (applying § 195(2)); *Nucor Corp. v. Gen. Elec. Co.*, 812 S.W.2d 136, 144 (Ky.1991) (§ 354); id. at 145 n. 2 (§ 350); *Stevens v. Stevens*, 798 S.W.2d 136, 139 (Ky.1990) (§ 305). Further,

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[4] If we were to analyze this issue as supplying a missing term rather than interpreting existing terms, we would reach the same conclusion, employing the same analysis under Restatement (Second) of Contracts § 204 as employed in Part III.B.

Kentucky courts have recognized the principle that "if a contract is silent on a certain point, the law will imply an obligation to carry out the purpose for which the contract was made"-exactly the substance of § 204. *Old Republic Ins. Co. v. Ashley*, 722 S.W.2d 55, 58 (Ky.Ct.App.1986) (citing Warfield Nat. Gas Co. v. Allen, 248 Ky. 646, 59 S.W.2d 534 (1933)). *Cf. Richardson v. Eastland, Inc.*, 660 S.W.2d 7, 8 (Ky.1983) ("Where the contract is silent we must interpret the intent of the parties.").[5] Sitting in diversity, our duty is to apply the law of the forum state as announced by its highest court. *West Bay Exploration Co. v. AIG Specialty Agencies of Tex., Inc.*, 915 F.2d 1030, 1034 (6th Cir.1990). Where the relevant state supreme court has not spoken on an issue, we apply the rule that we believe the state supreme court would apply if it were to decide the case. *Himmel v. Ford Motor Co.*, 342 F.3d 593, 598 (6th Cir.2003). Under these circumstances, we believe the Kentucky Supreme Court would employ Restatement § 204. Accordingly, so do we.

Section 204's comment d instructs courts to apply "community standards of fairness" to determine a term that is reasonable in the circumstances. Here, it is clear that none of the parties expected to receive the demutualization proceeds, which will constitute a windfall to whoever receives them. It is also clear that NSA's decision to terminate the Plan in 1986 relieved it of any risk associated with the Plan-namely, the responsibility to provide whatever

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[5] Southwire argues that Kentucky courts are reluctant to add terms to contracts. The cases it cites, however, are readily distinguishable, as they concern courts refusing to alter the existing terms of the contracts in question. See, e.g., O.P. Link Handle Co. v. Wright, 429 S.W.2d 842, 847 (Ky.1968) (declining "to change the obligations of a contract"); State Farm Mut. Auto. Ins. Co. v. Hobbs, 268 S.W.2d 420, 422 (Ky.1954) (stating that the court cannot "make a contract for the parties or revise the agreement while professing to construe it" and refusing to alter the contract's express termination date).

level of funding is necessary to yield the fixed level of benefits promised. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 439, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999) (noting that under an ongoing defined benefit plan, "the employer typically bears the entire investment risk and-short of the consequences of plan termination-must cover any underfunding as the result of a shortfall that may occur from the plan's investments").[6]

At the same time, the termination of the NSA Plan shifted risk onto the Employees. On paper, at least, the Employees are entitled to exactly the same level of benefits under the annuity contracts as they were under the NSA Plan, but crucially, their benefits are no longer guaranteed. Under ERISA, ongoing pension plans are guaranteed by the Pension Benefit Guarantee Corporation (PBGC). *See* 29 C.F.R. § § 4022.1 et seq. Not so for the annuity contracts. If Prudential were to become insolvent and default on its obligations under the annuity contracts, the Employees would be unable to recover the full value of the benefits. Accordingly, the NSA Plan's termination-the very event that necessitated purchase of the annuity contracts-stuck the Employees with a new (and unbargained-for) risk. Applying community standards of fairness, the inserted term should not entitle a party absolved of risk, such as Southwire, to unforeseen demutualization proceeds in preference to the party burdened with additional risk. Accordingly, we supply

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[6] Contrary to the dissent's conclusion, *Jacobson* in no way forecloses the Employees' claim to the demutualization proceeds. The dissent apparently fails to appreciate the key distinction between the two cases: *Jacobson* involved an ongoing retirement plan, whereas the Plan at issue here has been defunct since 1987. Consequently, as explained in Part III.C., the funds at issue could not have belonged to the Plan, and thus could never have been "plan surplus." For this reason, *Jacobson* is not controlling.

a term to the annuity contracts entitling the Employees to the demutualization proceeds.[7]

**The Nature of Demutualization**

Finally, the nature of demutualization compels the conclusion that Southwire never could have had any right to the demutualization proceeds. As noted above, by definition demutualization "involves a conversion of the mutual policyholders' ownership interest in the old [mutual] company into ownership interest in the form of stock in the new [stock] company." *UNUM Corp. v. United States*, 130 F.3d 501, 502 (1st Cir.1997), *cert. denied*, 525 U.S. 810, 119 S.Ct. 42, 142 L.Ed.2d 32 (1998). Here, no ownership interests materialized until April 1988, when Irving purchased the annuity contracts for the Employees' benefit.[8] NSA did not purchase any annuities from Prudential, and was not the contract-holder. The same is true of Southwire, NSA's parent company. Accordingly Southwire did not hold, and could not have held, any membership interest in Prudential, and thus could not have held any claim to the demutualization proceeds.

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[7] Were we to attempt to discern the term to which the parties to the annuity contracts would have agreed (the less-favored mode of analysis under § 204's comment d ), we would reach the same conclusion. As noted above, NSA's decision to terminate the Plan burdened the Employees with a risk for which they did not bargain. Accordingly, we conclude that under the "hypothetical model of bargaining" approach, Irving as the trustee would have demanded that any unanticipated proceeds from an unforeseen insurance company demutualization inure to the Employees to compensate them for this additional risk. Prudential would not have been in a position to favor either the Employees or Southwire, and would not have objected to this term.

[8] The signature pages reflect that the contracts were signed in April 1988, but were effective November 1, 1986.

Similarly, the ownership interests in Prudential never inured to the NSA Plan. The Plan's trustee (Irving) purchased group annuity contracts from Prudential to effectuate the "final distribution" of the Plan's assets under 29 U.S.C. § 1341(b)(3). This purchase represents the "closeout" of the Plan under 29 C.F.R. § 4041.28. Only then, after the NSA Plan terminated, did any entity (Irving) receive an ownership interest in Prudential. Thus, like Southwire, the NSA Plan could not have held a right to demutualization proceeds. Southwire apparently recognizes as much, as it states that the right to demutualization proceeds does not constitute a "plan asset[ ]." Southwire Br. at 26.[9] In sum, because neither Southwire nor the NSA Plan ever held an ownership interest in Prudential-a precondition for entitlement to demutualization proceeds-neither could have been entitled to the money at issue.

The court did not address the critical distinction between ongoing and defunct plans and did not provide any explanation of how demutualization proceeds can become an asset of a plan that is defunct and has no assets. Consequently, it appears doubtful that the case was correctly decided.

We reject the Northern District of Illinois's analysis, and instead follow the 2003 DOL opinion, which addresses

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[9] The Northern District of Illinois concluded in an unpublished opinion that the rights to an unforeseen demutualization may constitute "plan assets." *See Chicago Truck Drivers Union (Indep.) Health & Welfare Fund v. Local 710, Int'l Bhd. of Teamsters*, No. 02 C 3115, 2005 WL 525427 (N.D.Ill. March 4, 2005) (unpublished opinion). Although the case involved a pension plan that had terminated decades ago, the court based its conclusion on two interpretive letters from the Department of Labor that both addressed situations involving ongoing ERISA-covered plans. See U.S. Dep't of Labor, Employee Benefits Security Admin. Advisory Op.2001-02A (Feb. 15, 2001); U.S. Dep't of Labor, Pension & Welfare Benefits Office of Regulations & Interpretations Advisory Op. 92-02A (Jan. 17, 1992).

how to treat demutualization proceeds purchased with the funds of a defunct pension plan. See Dep't of Labor, Office of Pension and Welfare Benefit Programs Op. No.2003-05A, 2003 WL 1901900 (Apr. 10, 2003).

Southwire disagrees, arguing that the right to demutualization proceeds reverted to NSA along with the $11.5 million in surplus trust funds. Flaws in this argument abound. First, Southwire overlooks that neither NSA nor the NSA Plan ever held any ownership interest in Prudential, as explained above.

Second, Southwire's argument tortures the language of the Plan documents, which provide that only "funds remaining after the satisfaction of all liabilities" revert to Southwire. J.A. at 463 (NSA Pension Plan ¶ 9.2). Southwire provides no reason for us to accept the counterintuitive proposition that an asserted right to proceeds from an unforeseen, and at the time unlawful, future demutualization of an insurance company was a fund remaining in the NSA Plan after Irving purchased the group annuity contracts.

Finally, Southwire's argument misdefines the right at issue. Southwire's position assumes the existence of some abstract right to demutualization proceeds, a right that apparently existed not only at a time predating the demutualization plan, but even when demutualization was not even legal and thus hardly foreseeable. This assumption is infinitely dubious, as the stack of documents regarding the Plan termination, purchase of annuity contracts, and reversion of remaining funds contains nary a word regarding such a right.

In reality, rights to proceeds from a demutualization arise only when a mutual insurance company demutualizes, and in such a situation, the mutual company's

demutualization plan defines those rights. With a proper understanding of the right at issue, it is apparent that no right to the Prudential demutualization proceeds could have arisen prior to December 2000, when Prudential announced its plan to demutualize. By that time, the NSA Plan-the only vessel through which Southwire could receive any right to demutualization proceeds-had been defunct for over a dozen years.

In short, Southwire's position is incompatible with the definition of demutualization. This problem does not, however, apply to the Employees' position, which is perfectly consistent with the understanding that no rights to demutualization proceeds arise until the demutualization is announced, absent a clear earlier agreement.

**Century's Appeal**

Century argues that it received the right to the demutualization proceeds from Southwire when it purchased from Southwire the Hawesville plant and associated assets in 2000. We have already concluded that Southwire never had any right to the demutualization proceeds. Accordingly, Century could never have received from Southwire any right to or interest in the funds here at issue, as they were not Southwire's to sell.

**CONCLUSION**

For all of the foregoing reasons, we **REVERSE** the district court's order granting summary judgment to Southwire and denying the Employees' motion for summary judgment, and **REMAND** this case for further proceedings consistent with this opinion. Additionally, we **VACATE** the district court's order granting judgment to Southwire and denying Century's motion for summary judgment, and **DISMISS** Century's appeal as moot.

MOORE, J., delivered the opinion of the court, in which COHN, D. J., joined.

ALICE M. BATCHELDER, Circuit Judge, dissenting.

I respectfully dissent, as I disagree with the reasoning and the outcome of the majority opinion. I believe this case is foreclosed by *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440-41, 119 S. Ct. 755, 142 L.Ed.2d 881 (1999) (holding that plan participants in a defined benefit pension plan have no claim to the plan's surplus assets). This case involves a defined benefit plan. There is no dispute that the annuities were properly calculated and funded to ensure that the employees will receive all of the benefits promised under the plan. The $1.3 million is surplus; it did not evolve over time into an additional defined benefit or become part of the annuity payments.

The majority provides multiple theories for gifting this money to the employees. None of these theories, however, changes the basic, irrefutable fact that these employees are only entitled to the benefits defined under the plan, and correspondingly, secured by the annuities. There is no evidence in the record and we have no basis to assume that these employees will not receive from Prudential all of the benefits to which they are entitled. I would affirm the decision of the district court and hold that this money represents surplus assets of a defined benefit plan, which was paid into the trust by the employer and must be returned to the employer as trust settlor.

**APPENDIX B**

**UNITED STATES COURT OF APPEALS**
**FOR THE SIXTH CIRCUIT**

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No. 05-6390
No. 05-6456

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BANK OF NEW YORK, AS FORMER TRUSTEE FOR NATIONAL – SOUTHWIRE COMPANY PENSION PLAN

Plaintiff,

v.

SOUTHWIRE COMPANY,

Defendant-Appellee (05-6390/6456)

v.

JOHN STEPHEN JANOWICK, ON BEHALF OF HIMSELF AND AS THE REPRESENTATIVES OF A CLASS OF CURRENT AND DEFERRED ANNUITANTS OF PRUDENTIAL GROUP ANNUITY CONTRACTS GA 5543 AND GA 5542, ET AL.,

Defendant-Appellants (05-6390),

CENTURY ALUMINUM COMPANY,

Defendant-Appellant (05-6456).

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Before: BATCHELDER and MOORE, Circuit Judges; and COHN,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the cases. Accordingly, the petition is denied. Judge Batchelder would grant rehearing for the reasons stated in her dissent.

**ENTERED BY ORDER OF THE COURT**

/s/ Leonard Green, Clerk

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* Hon. Avern Cohn, Senior United States District Judge for the Eastern District of Michigan, sitting by designation.

## APPENDIX C

**United States District Court**
**FOR THE WESTERN DISTRICT OF KENTUCKY**

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No. Civ.A. 4:03CV-20-M

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BANK OF NEW YORK

Plaintiffs,

v.

JOHN STEPHEN JANOWICK, et al

Defendants.

DECIDED: Aug. 10, 2005.

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Frank F. Chuppe, Wyatt, Tarrant & Combs, Louisville, KY, Julianne M. Plumb, Leo T. Crowley, Pillsbury Winthrop LLP, New York, NY, for Plaintiff.

Douglas L. Greenfield, Leon Dayan, Philip Hostak, Robert Alexander, Bredhoff & Kaiser, Washington, DC, Herbert L. Segal, Segal Stewart Cutler Lindsay Janes & Berry PLLC, Joseph Lee Hamilton, Stites & Harbison, Kurt A. Scharfenberger, Goldberg & Simpson, Lisa H. Thomas, Woodward, Hobson & Fulton, LLP, Mark S. Riddle,

Nicholas W. Ferrigno, Jr., Greenebaum Doll & McDonald, Ayna N. Roby, Frank P. Doheny, Jr., Stephanie Baker Wilcher, Dinsmore & Shohl LLP, Louisville, KY, for Defendants.

**MEMORANDUM OPINION AND ORDER**

MCKINLEY, J.

***1** This matter is before the Court upon cross-motions for summary judgment filed by the Defendant Century Aluminum ("Century") [DN 56] and Crossclaim Plaintiff Southwire Company ("Southwire") [DN 57]. Having been fully briefed, the matter now stands ripe for decision.

For the reasons discussed below, Century's motion for summary judgment DENIED while Southwire's motion for summary judgment is GRANTED.

## I. LEGAL STANDARD

The summary judgment standard requires that the Court find that the pleadings, together with the depositions. interrogatories and affidavits, establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56. The moving party bears the initial burden of specifying the basis for its motion and of identifying that portion of the record which demonstrates the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party satisfies this burden, the non-moving party thereafter must produce specific facts demonstrating a genuine issue of fact for trial. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). The facts of this case are largely undisputed, and as both parties have

moved for summary judgment, the Court reviews the uncontested facts.

## II. BACKGROUND

### A. Procedural Background

This is the second phase of a bifurcated interpleader determination filed by the Plaintiff, Bank of New York, to determine entitlement to the unanticipated proceeds of an insurance company's demutualization. The proceeds have been deposited with the Court. In the first part of the action, the Court determined entitlement between a class of former Southwire employees (the "Annuitants") and Southwire, holding that Southwire was entitled to the proceeds. In this phase of the action, the Court determines the entitlement to the funds as between Southwire and Century Aluminum, a purchaser of one of Southwire's subsidiaries.

## B. Summary of Facts

In 1970, National Southwire Aluminum Company ("NSA"), a former subsidiary of Southwire, established a pension plan (the "Plan") for the benefit of its employees. The Plan provided a fixed amount of monthly income for its eligible employees, hence it is referred to as a defined-benefit plan. The Plan constituted a qualified retirement plan and trust subject to dictates of federal law, including the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(2)(a). NSA entirely funded the Plan and provided periodic contributions to the Plan in amounts consistent with ERISA regulations. The funds NSA contributed were then held in trust by Irving Trust Company, now Bank of New York ("BNY"), for the benefit of the Plan's participants and/or beneficiaries. If there were insufficient assets to satisfy the obligation of the Plan, NSA was responsible for providing additional funds to meet the Plan's obligations.

In 1986, NSA terminated the Plan. According to federal law, the plan funds were used to purchase termination annuities from the Prudential Insurance Company of America ("Prudential"). The beneficiaries under the Plan became the Annuitants under two Group Annuity contracts. The contract-holder of the Group Annuity was the trustee of the Plan, Irving Trust Company. Thereafter, NSA was relieved of its obligation to pay benefits under the Plan. Eleven million dollars of surplus plan assets reverted to NSA pursuant to the terms of the Plan.

In 2001, Prudential, a New Jersey entity, converted its capital structure from that of a mutual insurance company to that of a stock company pursuant to New Jersey law. As part of the conversion, Prudential issued common stock to its policyholders. Consequently, Prudential issued shares of stock to the BNY, as successor of Irving Trust, because BNY

was the "contract-holder" of the two Group Annuity Contracts with Prudential. BNY informed Prudential that it neither had an interest in nor a right to the demutualization proceeds. In February, 2003, BNY filed this action because it received conflicting claims from the Annuitants, Southwire, and Century as to the ownership of the Prudential stock. BNY requested, and this Court permitted, BNY to liquidate the shares of stock and deposit the proceeds into its registry. BNY sold the shares, deposited the demutualization proceeds into the Court's registry, and was dismissed from this suit. In the first phase of this action, the Court determined that Southwire was entitled to receive the proceeds over the claims of the Annuitants based on principles of trust law and the language of the Plan. Now the Court must determine whether Southwire or Century is entitled to the proceeds.

As noted, NSA, a subsidiary of Southwire, established the plan in 1970. Between 1990 and 2001, NSA underwent several name changes and corporate restructures. In 2001, Southwire sold a subsidiary, Metalsco, to Century. It is because of the acquisition of Metalsco that Century claims the right to the demutualization proceeds. It is undisputed that these proceeds were entirely unanticipated and not specifically contemplated in Century and Southwire's negotiations.

## III. DISCUSSION

Century contends that the demutualization proceeds constitute "assets" of Metalsco, a Southwire subsidiary, and were effectively acquired as a result of Century's acquisition of Metalsco. Southwire initially contends that under the principles of trust law, the proceeds revert to Southwire.[1]

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[1] Because the Court finds that Century did not acquire rights to the annuity contracts in conjunction with its acquisition of Metalsco, the Court does not address Southwire's argument regarding trust principles.

Alternatively, Southwire asserts that Century never acquired rights in the proceeds by the acquisition of Metalsco. Finally, Southwire asserts that by refusing all responsibility for the pre-existing pension plan, Century effectively relinquished any and all involvement right to the annuity contracts, including the unexpected proceeds that arose from them.

Century acquired Metalsco in April, 2001. Two relevant documents were negotiated between Southwire and Century: the Stock Purchase Agreement and the Redemption Agreement. The Stock Purchase Agreement provided that Century would purchase all of the outstanding stock of Metalsco, a wholly-owned subsidiary of Southwire, as well as certain "properties and assets necessary for the operation of the Business." The Stock Purchase Agreement specifically lists the acquisitions of Century, including the "direct or indirect beneficial ownership of all of the Assets." Section 3.13 of the Stock Purchase Agreement defines the "Assets" included in the sale:

> all of the assets, properties, including real and personal property, whether tangible or intangible, and the rights which are used or intended for use in or in connection with the Business ... and with respect to contract rights ... all contracts, agreements and other arrangements used or intended to be used in or relating to the conduct of the Business ... the Assets, include without limitation to following: (vii) all claims, causes of action, choses in action, rights of recovery and

> rights of setoff of any kind (including rights to insurance proceeds) ... pertaining to, or arising out of, the Business and inuring to the benefit of the Seller or any of its Affiliates ... (x) all of the Seller's and its Affliliates rights, title and interest in, to and under all other assets, rights and claims of every kind and nature used in the Business.

Section 3.13 limits the scope of "Assets" to properties and rights "used or intended to be used in or relating to the conduct of the Business." Section 1.1 of the Stock Purchase Agreement defines "Business" to mean "the business of converting alumina into primary aluminum at the Plant and the sale of such primary aluminum, as conducted by Southwire and its Affiliates."

Southwire suggests that its long terminated pension plan, and any rights thereunder, do not constitute "Assets" intended for use in the manufacture and sale of aluminum. The Court agrees. This interpretation is consistent given NSA/Southwires's continued responsibility toward the Plan and Century's express disclaimer of any such responsibility. Section 7.1(c) of the Stock Purchase Agreement states that all Hired Employees shall receive all benefits to which they were entitled under the pre-existing annuity contract and that the annuity contracts would not be the responsibility of Century. Clearly, if any liability had arisen with respect to the annuity contracts and the pre-existing pension plan, Southwire would have been responsible. Other sections of the Stock Purchase Agreement specify the parties' respective responsibilities, or lack thereof, toward employees. Section 11.2(a)(v) of the Stock Purchase Agreement further requires

Southwire to indemnify, defend and hold harmless Century for "any Liabilities, losses, damages, claims, costs and expenses, interest, awards, judgments and penalties ... arising out of or resulting from ... Liabilities relating to the Employees Benefit Plans maintained prior to the Closing Date by Seller...."

Century and Southwire further agreed that Southwire would redeem out of Metalsco prior to the closing certain properties and liabilities that Century did not want. To this end, the parties executed a "Redemption Agreement" prior to the closing, in which any "Unwanted Property" was redeemed out of Metalsco. "Unwanted Property" is defined in the Stock Purchase Agreement as:

> all Property owned or held at any time on or prior to the Closing Date by, and any Liabilities of, Metalsco, Skyliner, NSA or any subsidiary of any of them or any predecessor of any of the foregoing, other than (i) the Assets, (ii) the Liabilities of the Business reflected in the Closing Balance Sheet, and (iii) the Assumed Liabilities and any other Liabilities of the Business expressly assumed hereunder.

The Court further agrees with Southwire that to the extent there were any rights to the annuity contracts remaining in Metalsco, those rights were expressly redeemed out as Unwanted Property.

Century alternatively contends that if the demutualization proceeds were redeemed out, the right would have been reassigned to Century as a "Contract Right of the Business" by operation of Section 2.1 of the Stock Purchase Agreement. The Court rejects this contention as well. The contract rights relating to the business which were conveyed as "Additional Assets" included real property, intellectual property, power contracts, supply contracts and the like. At the time of the sale, the annuity contracts were not viewed as an asset. In truth, neither party foresaw any potential benefit arising from the annuity contracts, only liability. They were not a "right" that Century intended for use "in the business."

## IV. CONCLUSION

The Court concludes that Southwire did not convey any rights as the sponsor of the pre-existing pension plan to Century. To the contrary, the purchase agreement makes it perfectly clear that Century rejected any and all responsibility toward the pre-existing plan. The annuity contracts were not assets which were to be used in the manufacture and sale of aluminum by Century at the Hawesville plant.

For the reasons set forth above, IT IS HEREBY ORDERED that the motion filed by Century Aluminum [DN 56] is denied and the Motion by Defendant and Crossclaim Plaintiff, Southwire Company, for summary judgment [DN 57] is granted.

## APPENDIX D

**United States District Court**
**FOR THE WESTERN DISTRICT OF KENTUCKY**

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No. Civ.A. 4:03CV-20-M

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BANK OF NEW YORK

Plaintiffs,

v.

JOHN STEPHEN JANOWICK, et al

Defendants.

DECIDED: Aug. 10, 2005.

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Frank F. Chuppe, Wyatt, Tarrant & Combs, Louisville, KY, Julianne M. Plumb, Leo T. Crowley, Pillsbury Winthrop LLP, New York, NY, for Plaintiff.

Douglas L. Greenfield, Leon Dayan, Philip Hostak, Robert Alexander, Bredhoff & Kaiser, Washington, DC, Herbert L. Segal, Segal Stewart Cutler Lindsay Janes & Berry PLLC, Joseph Lee Hamilton, Stites & Harbison, Kurt A. Scharfenberger, Goldberg & Simpson, Lisa H. Thomas, Woodward, Hobson & Fulton, LLP, Mark S. Riddle, Nicholas W. Ferrigno, Jr., Greenebaum Doll & McDonald, Ayna N. Roby, Frank P. Doheny, Jr., Stephanie Baker

Wilcher, Dinsmore & Shohl LLP, Louisville, KY, for Defendants.

## MEMORANDUM AND OPINION

This matter is before the Court upon a Motion for Summary Judgment filed by the Defendant and Crossclaim Plaintiff, Southwire Company ("Southwire") [DN 38] and a Motion for Summary Judgment filed by Defendant Class Representatives John Stephen Janowick, Gary Erwin, and Merl Kannapel ("Annuitants") [DN 40]. Having been fully briefed, the matter now stands ripe for decision. For the reasons discussed below, Annuitants' Motion for Summary Judgment is **DENIED** while Southwire's Motion for Summary Judgment is **GRANTED**.

## BACKGROUND

Southwire administered and maintained a pension plan ("the Plan") as part of the compensation it paid its employees from 1970 to 1986. The Plan provided a fixed amount of monthly income for its eligible employees, hence it is referred to as a defined-benefit plan. The Plan constituted a qualified retirement plan and trust subject to dictates of federal law, including the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1002(2)(a). Southwire entirely funded the Plan and provided periodic contributions to the Plan in amounts consistent with ERISA regulations. The funds Southwire contributed were then held in trust by Irving Trust Company, now Bank of New York ("BNY" or "Plaintiff"), for the benefit of the Plan's participants and/or beneficiaries. If there were insufficient assets to satisfy the obligation of the Plan, Southwire was responsible for providing additional funds to meet the Plan's obligations.

In 1986, Southwire decided to voluntarily terminate the Plan. In accordance with federal law, the plan funds held in trust were used to purchase termination annuities from The Prudential Insurance Company of America ("Prudential") sufficient to satisfy all benefits and liabilities under the Plan. The termination annuities came in the form of two Group Annuity Contracts. The beneficiaries under the Plan became Annuitants under the two Group Annuity Contracts. Prudential issued certificates to the Annuitants stating that Irving Trust (BNY) was the contract-holder of the Group Annuity. Pursuant to ERISA, Southwire was relieved of its obligation to pay benefits under the Plan. In addition, after the obligation to the plan participants was fully satisfied and all administrative costs were paid, eleven million dollars ($11,000,000.00) remained. This money reverted to Southwire pursuant to the terms of the Plan.

Fifteen years later, in 2001, Prudential, a New Jersey entity, converted its capital structure from a mutual insurance company to a stock company pursuant to New Jersey law. As part of the conversion, Prudential issued common stock to its policyholders. Consequently, Prudential issued 35,119 shares of stock to the BNY, as successor of Irving Trust, because BNY was the "contract-holder" of the two Group Annuity Contracts purchased from Prudential.

BNY informed Prudential that it neither had an interest in nor a right to the demutualization proceeds. Subsequently, BNY learned that both the Annuitants and Southwire claimed an interest in the demutualization proceeds. Unfortunately, the Group Annuity Contracts did not specify who was entitled to these demutualization proceeds. In February, 2003, BNY filed this action because it received conflicting claims from the Annuitants and Southwire as to the ownership of the Prudential stock. The Court allowed BNY to liquidate the shares of stock and deposit the proceeds into its registry. BNY deposited

$1,357,703.69 into the Court's registry on November 11, 2003, and was dismissed from this suit. The Court must determine which party is entitled to these proceeds.

## DISCUSSION

This is a case of first impression and there is precious little guidance for the Court. Southwire initially asserts that ERISA supports reversion of the demutualization proceeds to Southwire. Alternatively, Southwire argues that trust law entitles them to the proceeds. The Annuitants respond arguing that ERISA does not apply, the Plan has terminated, and that the only existing contract is the annuity contract itself which is silent as to who should be entitled to the proceeds. As such, the Annuitants urge the Court to supply a term pursuant to § 204 of the Restatement (Second) of Contracts in accordance with community standards of fairness and policy . Southwire characterizes the Annuitant's claim as a windfall, however, no analysis of this case can escape the fact that these proceeds will constitute a windfall for either party.

Southwire's argument that ERISA governs this situation is principally rejected because the Plan was terminated in 1986. On December 31, 1986, Southwire ceased maintaining the company pension plan, ceased benefit accruals, and terminated all obligations binding it under the Plan. After the Plan was terminated, ERISA no longer governed. The Department of Labor's Advisory Opinion 2003-05A (April 10, 2003) offers some assistance in this regard, however, it does not answer the ultimate question before the Court. In that opinion, the Department of Labor issued an advisory opinion addressing the same factual situation presented here–the proper disposition of

demutualization proceeds.[1] The Department of Labor advised that if the Plan was properly terminated under ERISA section 4044 and "all obligations and claims under the Plan were satisfied prior to the termination annuity contract provider's demutualization, there is no obligation under Title I of ERISA to treat demutualization proceeds as plan assets." Id. at 2. Thus, the Department of Labor reasoned that it would not be a violation of ERISA for the Group Annuity Contact Holder to take possession of the demutualization proceeds, and further stated that

> [t]he question of whether the employer or the beneficiaries of the termination annuity contract are the actual owners of the demutualization proceeds received by the employer as the named policyholder of the annuity is not within the jurisdiction of the Department of Labor under Title I of ERISA...[and is instead] governed by the terms of the contract and applicable state law.

Id.

---

[1] The Employee Benefits Security Administration of the United States Department of Labor handles requests for interpretation and rulings of Title I of ERISA. Advisory opinions apply the law to a specific set of facts, issued in the form of information letters. ERISA advisory opinions have been interpreted by courts as persuasive, but not controlling authority. The limits of advisory opinions are discussed in *Chevron U.S.A., Inc., v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), *United States v. Mead Corp.*, 533 U.S. 2181 (2001), and *Hospital Corp. of Am. & Subsidiaries v. C.I.R.*, 348 F.3d 136 (6th Cir. 2003).

Both parties use the Department of Labor Advisory Opinion to bolster their arguments. Southwire maintains that under New Jersey law, all "eligible policy holders" are entitled to demutualization proceeds in exchange for their ownership rights associated with their policies. N.J.S.A. 17:17-3(c). The definition of policyholder is "the contract-holder of any group annuity contract." N.J.S.A. 17B:18-13. This also applies to the policyholder of a group annuity contract. Id. at (d). Therefore, according to Southwire, the contract-holder of the Group Annuity Contracts, not the Annuitants, would be entitled to the demutualization proceeds. The Annuitants have responded, correctly, that the Group Annuity Contracts plainly state that Irving Trust (BNY) is the contract-holder. Furthermore, the Annuitants point out, Southwire has not complied with the explicit appointment clause of the Contracts, a clause which required that "with the consent of the Prudential, [the original Contract-Holder may] appoint a successor Contract-Holder." No notification or appointment of Southwire ever took place. Furthermore, even if Southwire were to establish itself as the contract-holder, as the Annuitant's brief successfully demonstrates, that status only entitles it to initial possession of the proceeds, not necessarily ownership thereof.

The Annuitants agree with the Department of Labor opinion that this issue should be decided by the terms of the contract and applicable state law. Since the Group Annuity Contract is silent as to this issue the Annuitants urge the Court to look to § 204 of the Restatement (Second) of Contracts. Under § 204 of the Restatement (Second) of Contracts (1981), the deciding Court may supply a term which is reasonable under the circumstances. The specific doctrine states:

> When the parties to a bargain sufficiently defined to be a contract have not agreed with

> respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

Rest. 2d Contracts § 204 (1981).

The Restatement explains that such an omission can occur where, "[t]he parties to an agreement...entirely fail to foresee the situation which later arises and gives rise to that situation." *Id.*

The Kansas Supreme Court applied this doctrine in a similar case, *NEA-Coffeyville v. Unified School District No. 445*, 996 P.2d 821 (Kan. 2000). The question before the Kansas Supreme Court was who was entitled to surplus funds that originated from group health insurance policies that a school district had purchased for its employees. Like the case *sub judice*, the contracts governing the parties' relationship were silent on the issue of the possibility of excess funds or their potential ownership. The court stated that "the negotiated agreements entirely failed to foresee the possibility of the refund ... [and] [u]nder such circumstances, this court should supply a term which is reasonable in the circumstances." *Id.* at 831. The Court then determined, according to the "community standards of fairness and policy," that the teachers were more entitled to the funds. Id.

Employing an analysis similar to *NEA-Coffeyville*, the Annuitants claim that "co mmunity standards of fairness and policy" warrants this Court to award them the demutualization proceeds for two equitable reasons. First, "fairness" entitles the Annuitants to the proceeds because they now bear the risks associated with Plan, not Southwire. Southwire shifted the risk of the Plan from itself to the

Annuitants when it terminated the Plan and purchased the annuity contracts. Once Southwire terminated the Plan and federal law no longer required it to contribute funds to the Plan, the Annuitants had to rely on the financial stability of the insurance company, Prudential. Moreover, once Southwire terminated the Plan and it was removed from the auspices of federal law, the proceeds were no longer protected by the federal Pension Benefit Guaranty Corporation ("PCGB").

Second, the Annuitants state that they are entitled to the funds because of the nature of the relevant transactions. The argument is that if the Plan's administrators purchased individual annuity contracts for each Plan participant rather than a group contract, each Annuitant would have been a contract-holder and entitled to the proceeds. The Annuitants believe it is unfair to deny them their beneficial interest in Prudential merely because the Plan's Trustee took a convenient, and less expensive, way to structure the purchase of the termination annuities. Further, the Annuitants warn against establishing precedent that would encourage employers to choose riskier, lower-priced annuity options for their employees in hopes that a reversion of assets would eventually occur.

In determining what is reasonable under the circumstances the Restatement provides:

> Sometimes it is said that the search is for the term the parties would have agreed to if the question had been brought to their attention. Both the meaning of the words used and the probability that a particular term would have been used if the question had been raised

> may be factors in determining what term is reasonable in the circumstances. But where there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy [.]

Rest. 2d Contracts § 204, cmt. d.

Kentucky has not officially adopted or rejected the Restatement, nor has it specifically referenced § 204.[2] In fact, as pointed out by Southwire, Kentucky courts have been rather consistent in declining to add terms to contracts which have not been bargained for between the parties. Also pointed out by Southwire, the two parties to the Group Annuity Contracts are Prudential and the Plan's trustee—not the Annuitants. Furthermore, the Court is not persuaded by the equitable arguments of Annuitants to such an extent that it deems it appropriate to engage in an analysis of "community standards of fairness and policy." Therefore, the Court rejects the Annuities proposal to utilize § 204 of the Restatement (Second) of Contracts. The Court believes that a more direct approach involving trust principles is the better approach to this issue.

While the Court agrees with the Department of Labor's analysis that ERISA does not apply to these facts,

---

[2] Annuitants point out, however, that many jurisdictions, including the courts of New York and New Jersey have embraced § 204 of the Second Restatement. *See, e.g., In re Miller's Estate*, 447 A.2d 549, 554 (N.J. 1982); *Reiss v. Financial Performance Corp.*, 715 N.Y.S.2d 29 (App.Div., 1st Dept. 2000). Further, Kentucky courts have frequently looked to the Second Restatement for contract rules in other sections. *See e.g. General Motors Corp. v. Herald*, 833 S.W.2d 804 (Ky. 1992); *Stevens v. Stevens*, 798 S.W.2d 136 (Ky.1990).

that does not mean that ordinary trust principles should not be utilized. After all, even though ERISA governed this employee benefit plan, it was still only a trust that Southwire created for the benefit of its employees. Irving Trust Company was the Trustee and its powers and duties were set out in the trust documents. In order to terminate the trust properly under ERISA, the Trustee purchased termination annuities which served to fully satisfy Southwire's obligations to its employees. Irving Trust became the Contract-holder of the termination annuities only because it was the purchaser of the Group Annuity Contracts. Irving Trust was the purchaser only because it was the Trustee. Irving Trust had no role in this affair separate from its role as Trustee. Upon full satisfaction of these obligations and pursuant to the terms of the trust, $11 million of excess funds reverted to Southwire. Fifteen years later, when the demutualization proceeds came into the hands of The Bank of New York, successor to Irving Trust, as Contract-holder, the Trustee's obligations with respect to these funds was no different than if the funds been paid to the Trustee prior to termination. Prior to termination, these funds would be deemed ERISA plan assets and could only be used for the benefit of the employees, however, they would be paid over to Southwire upon termination if not needed to fully fund the termination annuities. The only significance of the fact that these funds came into the hand of the Trustee after the trust was terminated is that they are no longer technically ERISA plan assets. However, the fact remains that Southwire's obligation to its employees has been fully satisfied and these trust funds should be returned to the settlor of the trust pursuant to trust law and the terms of the document which created the trust.

## CONCLUSION

For the reasons set forth above, **IT IS HEREBY ORDERED** that the motion filed by Defendant Class

Representatives John Stephen Janowick, Gary Erwin, and Merl Kannapel is **denied** and the Motion by Defendant and Crossclaim Plaintiff, Southwire Company, for summary judgment is **granted**.

/s/ Joseph H. McKinley, Jr.,
Judge

## APPENDIX E

**29 U.S.C. § 1002(35)**

The term "defined benefit plan" means a pension plan other than an individual account plan; except that a pension plan which is not an individual account plan and which provides a benefit derived from employer contributions which is based partly on the balance of the separate account of the participants: (A) for the purposes of section 1052 of this title, shall be treated as an individual account plan, and (B) for the purposes of paragraph (23) of this section and section 1054 of this title, shall be treated as an individual account plan to the extent benefits are based upon the separate account of a participant and as a defined benefit plan with respect to the remaining portion of the benefits under the plan.

**29 U.S.C. § 1104(a)(1)**

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under

the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter and subchapter III of this chapter.

**29 U.S.C. § 1344(d)**

***(d) Distribution of residual assets; restrictions on reversions pursuant to recently amended plans; assets attributable to employee contributions; calculation of remaining assets***

(1) Subject to paragraph (3), any residual assets of a single-employer plan may be distributed to the employer if--

(A) all liabilities of the plan to participants and their beneficiaries have been satisfied,

(B) the distribution does not contravene any provision of law, and

(C) the plan provides for such a distribution in these circumstances.

(2)(A) In determining the extent to which a plan provides for the distribution of plan assets to the employer for purposes of paragraph (1)(C), any such provision, and any amendment increasing the amount which may be distributed to the employer, shall not be treated as effective before the end of the fifth calendar year following the date of the adoption of such provision or amendment.

(B) A distribution to the employer from a plan shall not be treated as failing to satisfy the requirements of this paragraph if the plan has been in effect for fewer than 5 years and the plan has provided for such a distribution since the effective date of the plan.

(C) Except as otherwise provided in regulations of the Secretary of the Treasury, in any case in which a transaction described in section 1058 of this title occurs, subparagraph (A) shall continue to apply separately with respect to the amount of any assets transferred in such transaction.

(D) For purposes of this subsection, the term "employer" includes any member of the controlled group of which the employer is a member. For purposes of the preceding sentence, the term "controlled group" means any group treated as a single employer under subsection (b), (c), (m) or (o) of section 414 of Title 26.

(3)(A) Before any distribution from a plan pursuant to paragraph (1), if any assets of the plan attributable to employee contributions

remain after satisfaction of all liabilities described in subsection (a) of this section, such remaining assets shall be equitably distributed to the participants who made such contributions or their beneficiaries (including alternate payees, within the meaning of section 1056(d)(3)(K) of this title).

(B) For purposes of subparagraph (A), the portion of the remaining assets which are attributable to employee contributions shall be an amount equal to the product derived by multiplying--

(i) the market value of the total remaining assets, by

(ii) a fraction--

(I) the numerator of which is the present value of all portions of the accrued benefits with respect to participants which are derived from participants' mandatory contributions (referred to in subsection (a)(2) of this section), and

(II) the denominator of which is the present value of all benefits with respect to which assets are allocated under paragraphs (2) through (6) of subsection (a) of this section.

(C) For purposes of this paragraph, each person who is, as of the termination date--

(i) a participant under the plan, or

(ii) an individual who has received, during the 3-year period ending with the termination date, a distribution from the plan of such individual's entire nonforfeitable benefit in the form of a single sum distribution in accordance with section 1053(e) of this title or in the form of irrevocable commitments purchased by the plan from an insurer to provide such nonforfeitable benefit,

shall be treated as a participant with respect to the termination, if all or part of the nonforfeitable benefit with respect to such person is or was attributable to participants' mandatory contributions (referred to in subsection (a)(2) of this section).

(4) Nothing in this subsection shall be construed to limit the requirements of section 4980(d) of Title 26 (as in effect immediately after the enactment of the Omnibus Budget Reconciliation Act of 1990) or section

1104(d) of this title with respect to any distribution of residual assets of a single-employer plan to the employer.

## APPENDIX F

**Excerpt from Class Defendants' [*i.e.*, the Annuitants'] Memorandum in Opposition to Southwire's Motion for Summary Judgment, pp. 8-9, FN 4**

The most straightforward reading of the record is that Irving Trust Company continued as the contract holder continuously, with a change in name to BNY, up to Prudential's distribution of demutualization proceeds and the filing of this lawsuit. We note that the only other conceivable conclusion one might draw from the record is that BNY *ceased to be the contract holder* after the Plan terminated and the Plan's trust was liquidated (because its status as contract holder in its capacity as trustee of the Plan ceased), and that *no successor contract holder was appointed*. *See* Exhibit 12. But that interpretation of the record would not aid Southwire, inasmuch as the Group Contracts contemplate the situation where there is no contract holder, providing that the contracts "remain in full force and effect" in the event that the contract holder "cease[s] to exist" or "cease[s] to perform the duties" of the contract holder. *See* Exhibit 4 at A4, Exhibit 5 at G3. And if the contracts continue in force with no contract holder, the only parties connected to the contract are Prudential and the third-party beneficiary Annuitants, who would then be entitled to the proceeds because they would be the only conceivable person left under the Group Contracts to which Prudential could pay the proceeds.

## APPENDIX G

**Section 9.2 of the National-Southwire Aluminum Company Pension Plan**

The Plan may be terminated by NSA or by the Pension Benefit Guaranty Corporation.

Before NSA can terminate the Plan, it shall give the Pension Benefit Guaranty Corporation notice of the proposed termination at least 10 days before the effective date of the termination. The Pension Benefit Guaranty Corporation shall have 90 days (or such longer period as agreed to between NSA and the Pension Benefit Guaranty Corporation or as ordered by a court) in which to decide whether the assets of the plan are sufficient to discharge, when due, all obligations of the Plan with respect to basic benefits. During this time, the Administrator and the Funding Agent shall not pay out any amounts under the termination procedure unless a notice of sufficiency is received. If the Pension Benefit Guaranty Corporation finds the assets are sufficient and permits NSA to terminate the Plan, NSA shall direct the Administrator and the Funding Agent to allocate the Plan assets, after providing for expenses of adminstration, to the extent that such assets shall be sufficient, for the purpose of providing retirement income and other benefits accrued under the Plan to date of discontinuance of the Plan and which have not theretofore been purchased from an insurance company, for the benefit of Participants, retired Participants, vested terminated Participants, or other beneficiaries in accordance with ERISA § 4044. Any funds remaining after the satisfaction of all liabilities with respect to Participants, retired Participants, vested and terminated Participants, and beneficiaries under the Plan shall be returned to NSA.

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(2)

No. 06-1701

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IN THE

# Supreme Court of the United States

SOUTHWIRE COMPANY,
*Petitioner*,

v.

JOHN STEPHEN JANOWICK, *et al.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

## BRIEF IN OPPOSITION

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## BRIEF IN OPPOSITION

## INTRODUCTION

This case raises a question of contract interpretation that turns on state-law contract interpretation principles and that has arisen so infrequently as to have generated only one reported decision—that of the Sixth Circuit below. Moreover, the question is unlikely to arise in the future, because the business movement giving rise to the dispute—the wave of "demutualizations," or conversions by mutual insurance companies (owned by their policyholders) into stock companies (owned by shareholders)—began in the 1990s and long ago subsided. The question concerns the proper disposition of proceeds from a demutualization that are attributable to a "termination annuity contract"—a contract purchased from a state-licensed insurance company by a terminating pension

plan to provide the plan's former participants with monthly annuity payments that are protected by state contract law, in lieu of monthly pension payments that are protected by the Employee Retirement Income Security Act (ERISA), 29 U.S.C. § 1001 *et seq.* More specifically, the question is whether demutualization proceeds born of such a contract should, in the absence of an express provision in the contract resolving the matter, be paid over to the annuitants who are the third-party beneficiaries of the contract, or, instead, to the employer who sponsored the pension plan before it was terminated and who is neither a party to the annuity contract nor a party responsible in any other way for guaranteeing the provision of the benefits conferred by that contract.

The Sixth Circuit—proceeding in accordance with the United States Department of Labor's opinions in this area—decided that question under state-law contract principles rather than under ERISA. Pet. App. 1a-19a. And the court of appeals decided the state-law question correctly under Kentucky law in ruling that, given the language, structure and purpose of the termination annuity contracts at issue in this case, the proper construction of the contracts was that, as between the two contestants, petitioner Southwire Company ("Southwire") and the respondent class of annuitants ("Annuitants"), the Annuitants should receive the proceeds of the demutualization. The Annuitants have the superior claim, the court reasoned, because (i) the Annuitants are third-party beneficiaries of the contract and are the only party at risk of loss in the event the insurer defaults before all of its payments are completed in the mid-21st century; and (ii) Southwire, in contrast, is neither a party to nor a beneficiary of the contracts, and is *not* at risk in the event of an insurer default, having removed itself from any responsibility to make pension payments by choosing to terminate its plan 15 years before the demutualization.

In holding that state law, rather than federal law, governs—and in resolving the state-law contract interpretation issue in

favor of the Annuitants—the Sixth Circuit reached a decision consistent with the decisions of other courts of appeals as well as with the decisions of this Court. The certiorari petition should therefore be denied.

## ARGUMENT

The Sixth Circuit proceeded in two steps in deciding this case. First, the court of appeals addressed the threshold question of whether state or federal law governs "disputes over demutualization proceeds born from an annuity contract purchased to terminate an ERISA plan." Pet. App. 8a. It decided that question by adopting the position of the Department of Labor that "the terms of the relevant annuity contracts and state law" govern such disputes. *Id.* Second, the court of appeals turned to a consideration of the language of the annuity contracts at issue here and to the state-law contract interpretation principles of the pertinent state, Kentucky, and concluded that under any of three possible approaches to construing the annuity contracts under Kentucky law, the Annuitants should prevail. Pet. App. 9a-15a.[1]

1. The Sixth Circuit's decision is, in both respects, fully consistent with the decisions of other federal appeals courts and of this Court. The two court of appeals decisions that Southwire cites, *Stewart v. National Education Ass'n*, 471 F.3d 169 (D.C. Cir. 2006), and *RLJCS Enterprises, Inc. v. Professional Benefit Trust Multiple Employer Welfare Benefit Plan & Trust*, 487 F.3d 494 (7th Cir. 2007), arose in a different context and decided a different issue. In particular, in both *Stewart* and *RLJCS*, the demutualization proceeds at issue were paid over to an *ongoing* ERISA plan, and the question presented was whether the proceeds constituted plan assets

[1] This lawsuit was filed in federal district court in Kentucky as an interpleader action on the basis of diversity jurisdiction, not on the basis of federal question jurisdiction. *See* Docket, *Bank of New York v. Janowick*, Case No. 03-cv-0020 (W.D. Ky.).

that, under ERISA and the terms of the documents governing the respective ongoing plans, the plan was permitted to retain for the benefit of all plan participants. 471 F.3d at 173-76; 487 F.3d at 495-97. In contrast, in this case, no ERISA plan was in existence at the time of the 2001 demutualization because Southwire *terminated* the plan in 1986, and, in so doing, fundamentally transformed the nature of the rights and responsibilities of the parties to the plan by transferring the obligation to provide the pension benefits from the plan sponsor to a state-law regulated insurance company.

That the transformation in the nature of the parties' legal rights that occurs upon a pension plan termination is fundamental, and not trivial as Southwire suggests (Pet. 11 n.5), was confirmed by this Court just a few months ago:

> [T]erminating a plan through purchase of annuities (like terminating through distribution of lump-sum payments) formally severs the applicability of ERISA to plan assets and employer obligations. Upon purchasing annuities, the employer is no longer subject to ERISA's multitudinous requirements. . . . And the PBGC [Pension Benefit Guaranty Corporation] is likewise no longer liable for the deficiency in the event that the plan becomes insolvent; there *are* no more benefits for it to guarantee. *The assets of the plan are wholly removed from the ERISA system*, and plan participants and beneficiaries must rely primarily (if not exclusively) on state-contract remedies if they do not receive proper payments or are otherwise denied access to their funds. Further, from the standpoint of the participants and beneficiaries, the risk associated with an annuity relates solely to the solvency of an insurance company, and not the performance of [a] . . . plan's investments.

*Beck v. PACE Int'l Union*, 551 U.S. __, 127 S. Ct. 2310, 2318-19 (2007) (first emphasis in original, second emphasis added).

In its decision below, the Sixth Circuit recognized the transformative effect of a plan termination in distinguishing this case from ongoing-plan cases. Pet. App. 16a-17a. In drawing that distinction, the court of appeals followed the analysis of the Department of Labor (DOL), expressed in two complementary opinions, the first issued in 2001, U.S. Dep't. of Labor, Pension & Welfare Benefit Programs Opinion No. 2001-02A (Feb. 15, 2001), 2001 WL 429857, and the second in 2003, DOL Opinion No. 2003-05A (Apr. 10, 2003), 2003 WL 1901900.

In the 2001 opinion, the Department concluded, as did the courts of appeal in *Stewart* and *RLJCS*, that in the case of annuity contracts held by *ongoing* plans, ERISA and the terms of the plan govern the disposition of any demutualization proceeds emanating from the contracts, because those proceeds are plan assets. 2001 WL 429857, at *2 n.2.

In the 2003 opinion—the opinion addressing the situation in this case involving a *terminated* plan—the Department concluded that the disposition of demutualization proceeds "is governed by the terms of the contract and applicable state law," and *not* by ERISA. 2003 WL 1901900, at *3. The Department reached that result after stating that proceeds generated by reason of an insurance company's demutualization that post-dates the termination of an ERISA plan are not ERISA "plan assets," 2003 WL 1901900, at *2-3—a statement that accords with this Court's later statement in *Beck v. PACE*, quoted above, that upon plan termination "[t]he assets of the plan are wholly removed from the ERISA system," 127 S. Ct. at 2318.

Once the distinction between the legal regime governing ongoing plans and the regime governing terminated plans is recognized, it becomes clear that the D.C. Circuit's decision in *Stewart* and the Seventh Circuit's decision in *RLJCS* not only present no conflict with the Sixth Circuit's decision in this case, but in fact complement that decision in the same

way that the two DOL opinions complement one another. In *Stewart* and in *RLJCS*, the plan at issue was an ongoing plan, not a terminated one, and the respective courts of appeal, consistent with the analysis set forth in the DOL's *2001* opinion concerning ongoing plans, looked to ERISA principles and the terms of the plan in resolving the disputes over demutualization proceeds. 471 F.3d at 173-76; 487 F.3d at 495-97. Here, the plan was terminated, and the Sixth Circuit, consistent with the DOL's *2003* opinion, looked to state law and the terms of the contract in resolving the dispute.

Given the clarity of the distinction between the issue the Sixth Circuit decided in this case and the issue the D.C. and Seventh Circuits decided in the *Stewart* and *RLJCS* cases, Petitioner's contention that there is a "deepening conflict among the Federal Courts of Appeals" (Pet. 1) is fanciful to say the least. Indeed, as Petitioner is forced to acknowledge in a footnote concession, "[t]he D.C. Circuit in *Stewart* distinguished the Sixth Circuit's majority opinion . . . noting that the group life insurance plan was *ongoing*." Pet. 11 n.5 (emphasis added). That concession reveals that Petitioner itself cannot be not serious in claiming that there is a genuine circuit conflict.

2. The Sixth Circuit's opinion is not only consistent with the decisions of other courts of appeal, it is correct on the merits; and it is not remotely an opinion that "decide[s] an important federal question in a way that conflicts with relevant decisions of this Court." Supreme Court Rule 10(a), so as to warrant review by this Court in the absence of a circuit conflict.

a. As we have noted, the Sixth Circuit here properly recognized that the second of the Department of Labor's two opinions concerning demutualization—the 2003 opinion—spoke to the issue presented in this case, and the court of appeals adopted the DOL's position that state law and the terms of the annuity contract control the disposition of de-

mutualization proceeds born of an annuity contract purchased to effectuate a plan termination. Pet. App. 8a.

The Petitioner does not even mention the 2003 DOL opinion in its certiorari petition, much less mount an argument that that opinion is unsound or unworthy of respect. That is because the Department of Labor's conclusion that state law and the terms of the annuity contract govern the disposition of post-termination demutualization proceeds is unassailable.

The Department's conclusion follows ineluctably from the fact—recognized by this Court in the block-quoted passage from *Beck v. PACE* set forth *supra* at 4—that the termination of an ERISA plan through the purchase of annuity contracts works a transformation in the rights and responsibilities of the parties to the plan, because it transfers the obligation to provide the pension benefits from the ERISA-regulated plan sponsor to a state-law regulated insurance company. *See Beck*, 127 S. Ct. at 2318-19.

Termination of an ERISA plan through the purchase of an annuity contract is therefore akin to a contract novation, whereby the insurance company/annuity provider becomes the new obligor pursuant to a new legal instrument (the annuity contract), which substitutes for the original legal instrument (the ERISA plan), releasing the original obligor (the plan sponsor) from legal liability. *See* 30 Williston on Contracts § 76:1 (4th ed. 1990). After the pension plan's termination, pension benefits are paid by the annuity provider pursuant to the terms of the annuity contract rather than by the plan pursuant to the terms of the plan's trust documents. And, the annuity contract is not an ERISA plan and is not governed by ERISA provisions; rather, it is an insurance contract governed in all its aspects by state contract and insurance law.

As the PBGC has explained and the courts have held, after a plan termination, if the annuity provider defaults and fails to

make the required monthly retirement payments to the former participants, the terminated plan is not "revive[d]," and the former plan's sponsor has no liability to the shortchanged former participants; the former participants' remedy is a state-law contract action under the annuity contract. *See Waller v. Blue Cross of Cal.*, 32 F.3d 1337, 1344-45 (9th Cir. 1994); PBGC Opinion Letter 91-4 (May 3, 1991), 1991 WL 80735, at *1 (concluding that where an ERISA pension plan was terminated properly and the insurer later became insolvent, the "former plan sponsors of the terminated plans would have no liability, under Title IV of ERISA, for plan benefits"); 29 C.F.R. §4041.28(d)(2); *see also Beck*, 127 S. Ct. at 2318-19.[2]

Because it is the state-law-governed annuity contract—and not the terminated ERISA-governed pension plan—that protects the beneficiaries' legal right to their pension benefits, the Department of Labor was therefore correct in concluding in its 2003 opinion that state contract law, rather than ERISA, governs disputes over the ownership of demutualization proceeds arising from termination annuity contracts. And the

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[2] The only other recourse possibly available to shortchanged former plan participants is a breach-of-fiduciary suit against the plan fiduciary who selected the annuity provider, but such a lawsuit is no substitute for plan benefits. That type of lawsuit cannot succeed where, at the time of the annuity purchase, the insurer appeared to be a financially sound and prudent choice of annuity provider, *see Waller*, 32 F.3d at 1344-45; and, because termination annuity contracts typically involve commitments to pay out funds over a period of decades, apparent financial soundness at the time of contract purchase is no guarantee of long-term financial soundness, as a spate of insurer insolvencies in the late 1980s demonstrates. *See* General Accounting Office Report No. 93-29, Private Pensions: Protections for Retirees' Insurance Annuities Can Be Strengthened (Mar. 1993) (documenting numerous insurer insolvencies). For these reasons, the Court in *Beck v. PACE* remarked that, after plan termination, no ERISA claim for benefits can be brought against the plan or its sponsor, and "plan participants and beneficiaries must rely primarily (if not exclusively) on state-contract remedies if they do not receive proper payments or are otherwise denied access to their funds." 127 S. Ct. at 2318.

Sixth Circuit was therefore right to follow the 2003 opinion's analysis and to distinguish this case from ongoing-plan cases governed by the DOL's 2001 opinion. *See* Pet. App. 8a, 16a; DOL Opinion, 2003 WL 1901900, at *3.[3]

b. It follows from the foregoing that there is no merit whatsoever to the Petitioner's contention that the Sixth Circuit's key ruling here—that state law and the terms of the annuity contract control—"'is foreclosed' by this Court's decision [construing ERISA] in *Hughes Aircraft* [*Co. v. Jacobson*, 525 U.S. 432 (1999)]." Pet. 10-11.

*Hughes Aircraft*, like the two circuit court cases that Petitioner invokes in support of its meritless claim of a circuit split, presented a question pertaining to the administration of an *ongoing* ERISA plan—there an ongoing ERISA "defined benefit" pension plan.[4] *Hughes Aircraft* did not even address,

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[3] Because state law governs upon plan termination, ERISA does not confer on *either* a former plan participant *or* a former plan sponsor a federal right to demutualization proceeds stemming from a termination annuity contract. Thus, the syllogism underlying the opinion of the dissenting judge below—that this case should be decided against the Annuitants because *ERISA* does not confer on them any right to the proceeds—begs the question. For it could be asserted with equal logic (or, rather, illogic) that this case should be decided against Southwire, because ERISA does not confer on *Southwire* any right to the proceeds. The reason that neither syllogism is satisfactory is that both exclude the possibility that state law, and *not* ERISA, governs post-termination, and both syllogisms therefore elide, rather than aid in answering, the fundamental question presented in this case.

[4] A "defined benefit" pension plan is one that promises participants that, upon retirement, they will receive a fixed level of benefits based on a formula (such as 50% of the average of their final three years' salary) that is independent of the performance of the plan's investments. In contrast, a "defined contribution" plan, such as the familiar "401(k) plan," provides each participant with a separate dedicated account to which periodic contributions are made during their career, and it promises each participant only that, on retirement, she will be entitled to those funds and the pro-

let alone resolve in Southwire's favor, the question as to whether, after a plan terminates, federal law continues to govern the relationships between and among the annuitants, the annuity provider, and the former plan's sponsor. On that matter, the only relevant authorities are this Court's recent decision in *Beck v. PACE*—which, as noted, states that "[t]erminating a plan through purchase of annuities . . . formally severs the applicability of ERISA to plan assets" such that "the assets of the plan are wholly removed from the ERISA system"—and the DOL's 2003 opinion, which reaches the same conclusion and provides that state law governs the relevant relationships upon plan termination.

Thus, as the Sixth Circuit observed, because the controversy here does not involve a dispute concerning the assets of an ongoing ERISA plan, but rather a distinctly different dispute that arises in a distinctly different factual and legal setting—*viz*, a dispute concerning proceeds that arise from annuity contracts governed by state law rather than by ERISA—"[*Hughes Aircraft v.*] *Jacobson* in no way forecloses the Employees' claim to the demutualization proceeds." Pet. App. 14a n.6.

Furthermore, Petitioner completely misreads *Hughes Aircraft* when it attempts to draw from the Court's observation that *ongoing* defined-benefit plans are characterized by "employer . . . investment risk" and a concomitant "employer[] obligation to make up any shortfall," 525 U.S. at 439-40, the inference that ERISA would entitle employers—*after* terminating a plan and hence *after* ridding themselves of any "obligation to make up any shortfall" in the event the insurance company annuity provider defaults—to reap the benefit of any and all unexpected proceeds generated by state-law governed termination annuity contracts.

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ceeds they generate. *See Hughes Aircraft*, 525 U.S. at 439; *see also infra* at 11-12.

The attempt to draw that inference fails at its inception, because the opinion in *Hughes Aircraft* expressly qualifies the very observations on which Petitioner relies concerning "employer . . . risk" and "employer[] obligation" by stating that those observations apply only "*short of the consequences of plan termination.*" 525 U.S. at 439-40 (emphasis added). Indeed by qualifying its observations in that manner, the *Hughes Aircraft* opinion indicates that, *upon* plan termination, the employer *sheds* the investment risk and accompanying ERISA obligation to cover any shortfall attendant to maintaining an ongoing defined-benefit plan. And, in that regard, the *Hughes Aircraft* opinion presages the Court's fuller statement of the same point in *Beck v. PACE*, where, as we have stressed, the Court explained that "[t]erminating a plan through purchase of annuities (like terminating through distribution of lump-sum payments) formally severs the applicability of ERISA to plan assets *and employer obligations*." 127 S. Ct. at 2318 (emphasis added).

c. While the foregoing is more than sufficient to rebut Southwire's claim that the Sixth Circuit's decision is "foreclosed by" *Hughes Aircraft*, we would also note that Southwire not only has overlooked the express qualifying language in *Hughes Aircraft* just discussed, but has missed the broader lesson of *Hughes Aircraft* as well.

*Hughes Aircraft* involved a claim by certain plan participants to a portion of the "surplus" assets in an ERISA defined-benefit plan; their claim was that the employer-sponsor used "their" portion of the surplus to create a new benefit structure that would only benefit other participants, who had not contributed to the growth of the surplus.

The Court, in rejecting the claim, began by stating that "it is essential to recognize the difference between defined contribution plans and defined benefit plans" in order "[t]o understand why respondents have no interest in the Plan's surplus." 525 U.S. at 439. That is so, the Court explained,

because the two types of plans differ in how the risk of loss is allocated. Employee-participants in a defined contribution plan bear the risk of poor performance of the investments assigned to their accounts, but they also reap the benefit of good performance, so that their income upon retirement will depend on the performance of the particular investments. *Id.* In contrast, in a defined benefit plan, all of the plan's investments are in one general pool of assets, the employer-sponsor bears the entire investment risk, and any shortfall in funding due to a decline in the value of plan assets must be covered by the employer out of its own pocket and not through a reduction in plan members' accrued benefits. *Id.* at 439-40. Participants in an ongoing defined-benefit plan are thus insulated from investment-performance risk, while the employer is fully exposed to that risk.

After setting out those background points, the *Hughes Aircraft* Court then rejected the claim of the plaintiff-participants there to a portion of the ongoing plan's surplus, reasoning that, "[s]ince a decline in the value of the plan's assets does not alter [plan members'] accrued benefits, members similarly have no entitlement to share in a plan's surplus." *Id.* at 440.

Thus if there is lesson of *Hughes Aircraft* that is relevant to this case, the lesson is that upside gain should be aligned with downside risk, and that, as a rule, the party that bears the risk in connection with a contract has a superior claim to "excess" investment gains than a party bearing no risk. Applying that lesson to the instant context, the reasoning of *Hughes Aircraft*—though not of course binding of its own force with regard to a state-law contract interpretation question—supports the Sixth Circuit's decision in favor of the Annuitants here, because the court of appeals undertook the Kentucky-law task of filling in the gap in the annuity contracts regarding the disposition of demutualization proceeds by assigning those proceeds to the parties that remained at risk,

the Annuitants, rather than to a party bearing no risk, Southwire. Pet. App. 13a-14a. *Cf. RLJCS Enters.*, 487 F.3d at 495, 495-97 (reasoning that, because under the *ongoing* ERISA welfare benefit plan at issue there, "the employees are assured of coverage even if a particular insurer should fail, [and] all assets of the [plan] stand behind every promised benefit," the plan was entitled to demutualization proceeds arising from the insurance policies held by the plan, and the individual insureds, who were insulated from the risk of an insurance company failure, were not so entitled).

3. Aside from claiming, erroneously as we have shown, that the Sixth Circuit's decision is in conflict with the decisions of other courts of appeal and with *Hughes Aircraft*, Southwire also suggests at various points that the Sixth Circuit erred in its construction of the annuity contracts under Kentucky law by, *inter alia*, misreading the "contract-holder" language in those contracts. Pet. 10-11, 20, 22-23.

Southwire's passing suggestions would not raise a matter worthy of this Court's attention even if, contrary to fact, those suggestions had potential substance. The purpose of this Court's certiorari review power is to resolve significant *federal* questions, as to which this Court is in a unique position to make final determinations that ensure uniformity across the federal system. This Court does not sit to pass on questions of state law, as to which state supreme courts possess final authority, much less does it sit to parse contract provisions under state-law interpretation principles.

The only *federal* question the Sixth Circuit decided was the threshold choice-of-law question itself, *viz.* whether the disposition of demutualization proceeds born of an annuity contract purchased to terminate an ERISA plan is governed by federal law and the terms of the defunct plan, or, as the DOL has concluded, by state law and the terms of the annuity contract. And, as we have shown, the Sixth Circuit's analysis

was not only consistent with that of other circuits and this Court, it was entirely correct.[5]

4. One final point merits discussion. The question presented in this case is an exceedingly narrow one highly unlikely to arise in the future with the frequency that could justify this Court's attention. This case is the only reported case involving the payment of unexpected demutualization proceeds arising from an annuity contract purchased by a terminating pension plan and paid out pursuant to an insurance contract that did not provide for the contingency of demutualization, and we are aware of only a handful of other instances where this has occurred. Further, as the Sixth Circuit's opinion notes, the termination annuity contracts here were purchased in 1986, before New Jersey and other states enacted laws in the 1990s repealing prohibitions on the conversion of mutual insurance companies to stock companies. Pet. App. 3a, 5a. Contracts and other legal instruments drafted after that legislative development are more likely to

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[5] At the risk of overkill, we would note that, even were one to indulge Southwire's view that federal law and the terms of the defunct plan govern the disposition of the demutualization proceeds here, this case *still* would not be fit for review by this Court. That is because the Sixth Circuit examined the plan provision that Southwire claimed entitled it to the demutualization proceeds, and the court concluded that Southwire had misconstrued the provision's language. Pet. App. 17a. In particular, the Sixth Circuit held that the provision in question did not state, as Southwire claims (Pet. 23), that funds coming into existence *after* plan termination (such as the demutualization proceeds here) revert to the plan sponsor; rather, the provision stated only that funds already held by the plan *prior* to termination so revert. Pet. App. 17a. This Court's attention and resources are not wisely expended on the review of case-specific determinations by lower courts as to the proper construction of a particular plan or trust document. And yet that is precisely what this Court would have to do if it were to agree with Southwire's dubious argument that the disposition of the proceeds here turns on federal law and the construction of the plan document, rather than on state law.

deal with the contingency in express terms, precluding disputes like the instant one.

Moreover, in the wake of those laws, the nation's mutual insurance companies decided promptly one way or the other whether to demutualize, and hence the wave of demutualizations that crested in the late 1990s had subsided by 2002. *See* Insurance Times: "Wave of Demutualizations by Life Insurers Subsides," October 15, 2002, Vol. XXI No. 21 (explaining that by 2002 all of the major mutual insurance companies had made their decision as to whether to demutualize). Thus, in addition to the other reasons for denying the certiorari petition, this case is not one of sufficient general importance to warrant this Court's attention.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 06-1701

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In The

# Supreme Court of the United States

SOUTHWIRE COMPANY,

*Petitioner,*

v.

JOHN STEPHEN JANOWICK, et al.,

*Respondents.*

**On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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## LIST OF PARTIES

The parties are:

Petitioner: Southwire Company

Respondents: Century Aluminum Company; John Stephen Janowick, Gary Erwin and Merl Kannapel, on behalf of themselves and as the representatives of a class of current and deferred annuitants of Prudential Group Annuity Contracts GA 5543 and GA 5542

## CORPORATE DISCLOSURE STATEMENT

Century Aluminum Company is a publicly owned corporation. Its stock symbol is CENX.

## INTRODUCTION

This case concerns which of three parties – Century Aluminum Company ("Century Aluminum"), certain beneficiaries of a terminated pension plan ("the Annuitants"), or Southwire Company ("Southwire") – is entitled to certain unanticipated proceeds of an insurance policy ("the proceeds"). In the district court, the parties agreed that the case presents two distinct disputes: one dispute as between the Annuitants and Southwire, and another dispute as between Southwire and Century Aluminum. The parties also agreed that the district court's resolution of the dispute between the Annuitants and Southwire should precede the court's resolution of the dispute between Southwire and Century Aluminum. Unless the district court held, in the first instance, that Southwire prevails over the Annuitants, then the Court need not have addressed the dispute between Southwire and Century Aluminum.

As it happens, the district court did conclude that Southwire is legally entitled to the proceeds as between Southwire and the Annuitants. The court, therefore, proceeded to address the dispute between Southwire and Century Aluminum. In spite of clear contractual language favoring Century Aluminum, the district court concluded that Southwire is entitled to the proceeds over Century Aluminum. Thus, both the Annuitants and Century Aluminum took appeals against Southwire in the United States Court of Appeals for the Sixth Circuit.

As in the district court, the Sixth Circuit properly considered the case as presenting two distinct disputes, one of which precedes the other. Unlike the district court, however, the Sixth Circuit held that the Annuitants are entitled to the proceeds over Southwire. The Sixth Circuit properly noted that its decision mooted Century Aluminum's

arguments on appeal. Century Aluminum's entitlement to any proceeds derives from the fact that it bought the right to such proceeds from Southwire. If Southwire never had the right to sell the proceeds in the first instance, then Century Aluminum could not have bought them from Southwire.

Southwire now petitions for this Court's review of the decision of the Sixth Circuit. The legal questions presented by Southwire concern, generally, which of two parties has the greater entitlement to excess proceeds of a terminated pension plan: the employer who established the plan, or the employee beneficiaries under the plan. Century Aluminum has not briefed these issues in either the district court or the Sixth Circuit. The issues have no bearing on whether, assuming Southwire is entitled to the proceeds, Century Aluminum bought the proceeds from Southwire. Thus, strictly speaking, Century Aluminum takes no position on whether this Court should grant or deny Southwire's petition for a writ of certiorari.

However, Century Aluminum is aware of this Court's admonition that all parties of record must correct "any perceived misstatement made in the petition" or else risk having any objection to such misstatement deemed waived. (*See* Supreme Court Rule 15.2.) That being said, Century Aluminum notes that Southwire's petition contains two pervasive misstatements that cannot go uncorrected. Century Aluminum will correct those misstatements in a brief counter-statement of the case.

## COUNTER-STATEMENT OF THE CASE

In order to put Southwire's misstatements in context, Century Aluminum will very briefly explain the background of this case.

In 1970, the National Southwire Aluminum Company ("NSA"), a subsidiary of Southwire, established the National

Southwire Aluminum Company Pension Plan ("the Plan") for the benefit of its employees. NSA funded the plan solely with its own funds, not Southwire's. As a subsidiary of Southwire, NSA maintained a separate legal existence and received no assistance from Southwire with creating, managing or funding the Plan in any way. (App. 2.)

In 1986, NSA terminated the Plan. In order to properly terminate the Plan in accordance with ERISA law and fully relieve itself of all obligations thereunder, NSA directed the trustee of the Plan (Irving Trust) to purchase annuity contracts to fully fund the benefits due the former beneficiaries under the Plan. At that time, the NSA employees formerly participating in the Plan became Annuitants under insurance contracts held in trust rather than participants under an ERISA plan. Southwire had absolutely no involvement in the termination of the Plan or the purchase of the annuity contracts. Those steps were taken solely by its subsidiary NSA. (App. 3.)

From 1986 to 2001, NSA changed corporate form several times. In April 2001, Century Aluminum bought the former NSA from Southwire. (App. 4.) The parties memorialized the sale of the former NSA in a Stock Purchase Agreement. Under the Stock Purchase Agreement, Century Aluminum acquired all assets, intangible and tangible, of every kind or nature whatsoever, of the former NSA. (App. 7-9.) Thus, it could not be clearer, as a matter of pure contractual interpretation, that if the former NSA had any right to unanticipated proceeds, Century Aluminum bought that right when it bought the former NSA from Southwire.

The foregoing briefly addresses the factual background and legal underpinning of the dispute as between Century Aluminum and Southwire. Century Aluminum will now address Southwire's two pervasive misstatements.

The first misstatement is Southwire's insistence on claiming that **it**, not its subsidiary **NSA**, created and bore responsibility for the Plan. This claim appears repeatedly throughout Southwire's petition as if it were fact. (See Parties to the Proceeding, wherein Southwire states the Plan was "funded solely by Southwire"; see also Statement of the Case, p. 4, where Southwire claims it "bore the entire cost of the Plan.") To the contrary, Southwire did **not** fund the Plan, did **not** terminate it, and did **not** arrange for the purchase of the annuity contracts. NSA took all of these steps, and, as such, Century Aluminum bought NSA's right to unanticipated proceeds from the annuity contracts when it bought the former NSA. (App. 1.)

The second misstatement is Southwire's characterization of the sale of the former NSA to Century Aluminum in 2001. Southwire attempts to limit the amount and kind of assets Century Aluminum bought by stating that Century Aluminum simply bought an "aluminum smelting plant." (See Parties to the Proceeding; see also Statement of the Case, p. 7 n.4.) The implication of this is that Century Aluminum bought a building and some equipment. In truth, the broadly-worded Stock Purchase Agreement supplied an all-inclusive definition of the assets that Century Aluminum purchased:

> **all of the assets**, properties, including real and personal property, whether **tangible or intangible**, and the rights which are used or intended for use in or in connection with the Business . . . and with respect to contract rights . . . **all contracts, agreements and other arrangements** used or intended to be used in or relating to the conduct of the Business . . . the Assets, include without limitation the following: . . . (vii) all claims, causes of action, choses in action, rights of recovery and rights of setoff of any kind (**including rights to**

> **insurance proceeds**) . . . pertaining to, or arising out of, the Business and inuring to the benefit of the Seller or any of its Affiliates . . . (x) all of Seller's and its Affiliates rights, title and interest in, to and under all other assets, rights and claims of every kind and nature used in the Business.

(App. 7-9.) (Emphasis supplied.) This language places **no limits** on the amount or nature of assets Century Aluminum purchased. Pursuant to this clear contractual language, Century Aluminum purchased the right to the proceeds at issue from Southwire.

## ARGUMENT

Century Aluminum takes no position on whether the Court should grant the Petition.

## CONCLUSION

Century Aluminum tenders this Brief in Opposition for the purpose of correcting misstatements in Southwire's Petition. Century Aluminum takes no position on whether the Court should grant the Petition.

Respectfully submitted,

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CASE NO. 05-6456

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**IN THE**
**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

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CENTURY ALUMINUM COMPANY,
*Defendant-Appellant;*

BANK OF NEW YORK,
*as former Trustee for National-Southwire Company Pension Plan,*
*Plaintiff;*

SOUTHWIRE COMPANY,
*Defendant-Appellee*

v.

JOHN STEPHEN JANOWICK,
*on behalf of himself and as the representatives of a class of current and deferred annuitants of Prudential Group Annuity Contracts GA 5543 and GA 5542, et al,*
*Defendants*

**On Appeal from the United States District Court for the Western District of Kentucky, No. 4:03-cv-00020-JHM**

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# FINAL BRIEF OF DEFENDANT-APPELLANT CENTURY ALUMINUM COMPANY

(Filed Mar. 15, 2006)

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**Oral Argument Requested**

* * *

## STATEMENT OF FACTS

In 1970, NSA, a subsidiary of Southwire, established the National Southwire Aluminum Company Pension Plan ("the Plan") for the benefit of its employees. (R. 62, Mem. and Op. and Order at 2, J.A. 772.) NSA funded the plan solely with its own funds. (*Id.*; R. 58-59, Opp. to Mot. for Sum. J. and Mem. re Mot. For Sum. J. at Exh. 1.) As a subsidiary of Southwire, NSA maintained a separate legal existence and received no assistance from Southwire with creating or managing the Plan in any way from inception to termination. (R. 62, Mem. and Op. and Order at 2, J.A. 772.)

Because the Plan constituted a qualified retirement plan and trust under the Employee Retirement Income Security Act of 1974 ("ERISA"), ERISA law obligated NSA to place the Plan assets in a trust ("the Trust"). (*Id.*) That trust was managed by Irving Trust Company, predecessor in interest to BONY, as Trustee for the benefit of the Plan participants. (*Id.* at 3, J.A. 773.) If at any time the Plan lacked sufficient assets, NSA bore sole responsibility for providing the funds necessary to meet the Plan obligations. (*Id.*)

In 1986, NSA terminated the Plan. (*Id.*) In order to properly terminate the Plan in accordance with ERISA law and fully relieve itself of all obligations thereunder, NSA directed Irving Trust, as Trustee of the Plan, to use Plan assets to purchase from Prudential Insurance Company of America ("Prudential") two group annuity contracts to satisfy all benefit liabilities under the Plan to former Plan participants. (*Id.*) The Prudential contracts, GA-5542 and GA-5543 (the "Annuity Contracts") were purchased to fully fund the benefits due the former beneficiaries under the Plan. (*Id.*)

Thus, the NSA Plan ended in 1986. The NSA employees formerly participating in the Plan had become Annuitants under insurance contracts held in trust rather than participants under an ERISA plan. (*Id.*) From 1986 onward, the Annuitants looked solely to the Prudential contracts, held in trust by the contract-holder Irving Trust (later, BONY), for their benefits. (*Id.*) NSA had fully satisfied its obligations under the Plan, and, after 1986, NSA had no conceivable liabilities or foreseeable benefits related to the terminated Plan. (*Id.*; R. 38, Mot. for Part. Sum. J. at 3-4, J.A. 54-55.)

Some years later, NSA's parent corporation, Southwire, became more involved in the management and control of NSA. Among other things, Southwire merged the last remaining NSA-sponsored pension plan into Southwire's retirement plan, and assumed the role of providing employee benefits administration to employees. (R. 57, Mot. for Sum. J. at 6.)

All of these events, of course, occurred years after the NSA Plan, which NSA created, funded, and terminated completely by itself, had ceased existence. Southwire

never purported to have any involvement – no benefits nor liabilities whatsoever – in the NSA Plan terminated in 1986.

From 1986 to 2001, NSA changed form several times (R. 56, Mot. for Sum. J. at 6-7, Exh. 1, J.A. 580-581, 587-607.) As of April 2001, what had been NSA in 1986 had now become NSA Ltd., a limited partnership owned by Skyliner, Inc., which was owned by Metalsco, Ltd. (*Id.*) When Century Aluminum acquired Metalsco, Ltd., in April, 2001, it thus acquired the former NSA. (*Id.*)

A few months later, what the District Court described as a "windfall" accrued from the Annuity Contracts the former NSA had purchased in 1986. (R. 49, Mem. and Op. at 3, J.A. 567; R. 62, Mem. and Op. and Order at 4, J. A. 774.) Like many other insurance companies at the time, in 2001 Prudential demutualized and became a publicly traded company. (R. 62, Mem. and Op. and Order at 4, J. A. 774.) This meant that Prudential converted its capital structure from that of a mutual insurance company to that of a stock company. (*Id.*) As part of this demutualization, Prudential issued common stock ("the demutualization proceeds," or "the proceeds") to its policyholders, including BONY, contract-holder of the Annuity Contracts NSA had purchased long ago. (*Id.*)

Because the Annuity Contracts were entered into in 1986, well before the wave of demutualization in the industry, no one anticipated that a demutualization might occur and the contracts do not specify who would be entitled to any demutualization proceeds attributable to the Annuity Contracts. (R. 49, Mem. and Op. at 3, J.A. 567.) The proceeds were unanticipated. (*Id.*) Therefore, in 2002, the designated contract holder, BONY advised

Prudential that BONY had no interest in, or right to, the demutualization proceeds. (R. 62, Mem. and Op. and Order at 3, J. A. 773.) After learning that the Annuitants, Southwire and Century Aluminum all claimed an interest in the demutualization proceeds, BONY liquidated the shares of stock, deposited what has grown to $1,357,703.69 into the Court's registry and filed the underlying interpleader action to resolve the conflicting claims. (*Id.*)

Century Aluminum, as the purchaser of the assets of NSA, now asks this Court to reverse the District Court and hold that Century Aluminum is entitled to the proceeds.

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## STOCK PURCHASE AGREEMENT

THIS STOCK PURCHASE AGREEMENT (the "Agreement") is made this 31st day of August, 2000, by and between CENTURY ALUMINUM COMPANY, a Delaware corporation ("Purchaser"), and SOUTHWIRE COMPANY, a Delaware corporation ("Southwire" or "Seller").

## BACKGROUND

A. Metalsco Ltd. ("Metalsco"), a Georgia corporation, is a wholly-owned subsidiary of Southwire.

B. Skyliner, Inc. ("Skyliner"), a Delaware corporation, is a wholly-owned subsidiary of Metalsco.

C. NSA, Ltd. ("NSA") is a limited partnership, whose only partners are Metalsco and Skyliner.

D. Through NSA, together with certain properties and assets owned by Southwire, Southwire conducts the Business (as defined herein).

E. Purchaser desires to purchase, either directly or through an entity established for the purpose, from Seller, and Seller desires to sell to Purchaser, the Business, and to such purpose, Purchase shall acquire from Seller on the Closing Date all of the then authorized, issued and outstanding capital stock of Metalsco (the "Shares") and certain properties and assets necessary for the operation of the Business, and Seller shall assign to Purchaser and Purchaser shall assume certain liabilities related to the operation of the Business, all as more fully described herein, upon the terms and subject to the conditions set forth herein.

AGREEMENT

NOW, THEREFORE, in consideration of the premises and of the mutual covenants, agreements, representations, and warranties herein contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties, each intending to be legally bound, agree as follows:

* * *

3.13 Assets.

(a) Except as set forth on *Schedule 3.13*, Seller or NSA, as the case may be, owns, leases or has the legal right to use all of the assets, properties, including real property and personal property, whether tangible or intangible, and rights which are used or intended for use in or in connection with the Business, including, without limitation, the Owned Intellectual Property, the Licensed Intellectual Property, the Real Property and any other tangible personal property, used or intended to be used in the conduct of the Business, and, with respect to contract rights, is a party to and enjoys the right to the benefits of all contracts, agreements and other arrangements used or intended to be used in or relating to the conduct of the Business, except as enforceability may be limited by bankruptcy, insolvency, reorganization, moratorium or other Legal Requirement affecting creditors' rights generally and by other equitable principles, including, without limitation, those limiting the availability of specific performance, injunctive relief and other equitable remedies. Other than the Additional Assets, which are owned or held by Seller as of the date hereof and will be transferred to Purchaser or an Affiliate or assignee of Purchaser designated by Purchaser on the Closing Date, all of the assets

described in the immediately preceding sentence are owned or held by NSA as of the date hereof. All such assets, properties and rights used or intended for use in the Business, including without limitation the Additional Assets, are hereinafter referred to as the "Assets." Except as provided in Section 3.13(b), the Assets include, without limitation, the following:

(i) the Plant, including the Real Property;

(ii) all furniture, fixtures, equipment, machinery, spare parts, packaging materials, oil and other tangible personal property used or held for use by Seller, Metalsco, Skyliner or NSA at the Plant or any other location at or from which the Business is conducted or otherwise owned or held by Seller and its Affiliates for use in the Business;

(iii) all vehicles and transportation equipment used or intended for use in the Business, all of which are identified on *Schedule 3.13(a)(iii)* attached hereto;

(iv) all Inventories and Receivables of the Business;

(v) the goodwill of Seller and its Affiliates relating to the Business;

(vi) all of Seller's and its Affiliates' right, title and interest in, to and under the Owned Intellectual Property and the Licensed Intellectual Property used in, or relating to, the Business;

(vii) all claims, causes of action, choses in action, rights of recovery and rights of set-off of any kind (including rights to insurance proceeds and rights under and pursuant to all warranties, representations and guarantees made by suppliers of products, materials or equipment, or components thereof),

pertaining to, or arising out of, the Business and enuring to the benefit of the Seller or any of its Affiliates;

(viii) all rights of the Seller and its Affiliates under all contracts, including without limitation Material Contracts, licenses, sublicenses, agreements, leases, commitments, and sales and purchase orders, and under all commitments, bids and offers (to the extent such offers are transferable), used in, or relating to, the Business;

(ix) all municipal, state and federal Permits, franchises, licenses, agreements, waivers and authorizations held or used by Seller or any of its Affiliates in connection with, or required for, the Business, to the extent transferable; and

(x) all of Seller's and its Affiliates right, title and interest held to and under all other assets, rights and claims of every kind and nature used in the Business.

Except as set forth on *Schedule 3.13*, Seller or NSA, as the case may be, has and NSA will have as of the Closing Date good and marketable title to, or, in the case of leased or subleased Assets, valid and subsisting leasehold interests in, all the Assets, free and clear of all Encumbrances, except for Permitted Encumbrances.

(b) Notwithstanding anything to the contrary contained in this Agreement or any Exhibit hereto or any Schedule furnished hereunder, the Assets shall not include, and neither Purchaser nor any Affiliate of Purchaser shall acquire any interest in, any of the following assets of or related to the Business:

(i) All claims, causes of action, choses in action, right of recovery and rights of set-off of any kind

(including rights to insurance proceeds and rights under and pursuant to all warranties, representations and guarantees) pertaining to or arising out of the Business, with respect to any event or occurrence prior to the Closing Date, that are listed on *Schedule 3.13(b)* (as of the date of this Agreement or supplementally prior to the Closing Date) which (x) have been asserted on or prior to the Closing Date by Seller or any of its Affiliates and (y) which seek to recover fro the account or benefit of Seller or any of its Affiliates all or a portion of any loss, cost, damage, expense or liability actually suffered or incurred by, or any amounts actually paid in repair, remediation, reconstruction or settlement (in each case, including reasonable attorneys' and consultants' fees) by, Seller or any of its Affiliates and not reflected as an asset on the Closing Balance Sheet;

(ii) all credits with respect to patronage capital owed to Seller or any of its Affiliates by Kenergy under the Power Contract for the time period up to and including the Closing Date;

(iii) the Closed Potliner Disposal Areas; and

(iv) the equipment comprising the Current Groundwater Recovery and Treatment System.

(c) The Assets, including the Material Contracts (taken together with the Shared Services Agreement, the Environmental Access and Cooperation Agreement, the Aluminum Supply Agreement and the Power Supply Agreements) constitute all the properties, assets and rights as are necessary in and for the conduct of the Business as presently conducted Except as set forth on Schedule 3.13(c), all of the Assets with a replacement value in excess of $5,000 and that (other than replacement parts or equipment) have been used in the Business

during the last twelve (12) months are and will be as of the Closing Date in good repair and operating condition and suitable for the purposes for which they are used or intended without the necessity of any repairs, the costs of which are reasonably likely to exceed with respect to any such Asset individually $10,000 or with respect to all such Assets $25,000 in the aggregate, and, since the date of the Reference Balance Sheet, Seller has and will have as of the Closing Date caused the Assets to be maintained in accordance with NSA's normal maintenance standards consistent with past practice of the Business.

* * *

(4)

No. 06-1701

IN THE

# Supreme Court of the United States

SOUTHWIRE COMPANY,
*Petitioner,*

v.

JOHN STEPHEN JANOWICK, *ET AL.*,
*Respondents.*

On Petition For Writ Of Certiorari
To The United States Court of Appeals For The Sixth Circuit

## PETITIONER'S REPLY TO BRIEFS IN OPPOSITION

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## INTRODUCTION

The Question Presented raises a conflict between the decision below and *Hughes Aircraft v. Jacobson*, 525 U.S. 432 (1999), and reveals a split among the Circuits concerning the legal principles to be used in determining the ownership of proceeds, received by the trustee of an employee benefit plan, arising from the demutualization of the issuer of group annuity or insurance contracts purchased to fund benefits under such plan. The Respondents, John Stephen Janowick, *et al.* ("Annuitants"), attempt to redefine the issue before this Court in an unsuccessful effort to harmonize the Sixth Circuit majority opinion with *Hughes Aircraft* and to manufacture common ground among the Circuits. These efforts cannot withstand scrutiny, and Southwire's petition should be granted.[1]

## ARGUMENT

1. The Annuitants are former participants in the National-Southwire Aluminum Company Pension Plan ("Plan") and third-party beneficiaries under the Group Annuity Contracts purchased to satisfy the Plan's benefit obligations upon the Plan's standard termination. In *Hughes Aircraft*, this Court unanimously held that participants and beneficiaries of a defined benefit pension plan "have a nonforfeitable right only to their 'accrued benefit,'" and have no interest in the surplus assets in the trust funding the plan. 525 U.S. at 440. The Annuitants attempt to distinguish *Hughes Aircraft* and its clear holding on the ground that the Southwire Plan was terminated and no longer an ongoing pension plan under the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Annuitants'

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[1] As used herein, "Southwire" shall refer to Southwire Corporation and its current and former subsidiaries and affiliates, unless the context plainly otherwise requires.

Brief in Opposition ("Opp"), at 9. The Annuitants fail to explain, however, why mere termination of the Plan confers participants and beneficiaries rights under state law to surplus funds coming into the trust that funded the Plan after termination, where no such rights existed before. The Annuitants have received their accrued benefit. *Hughes Aircraft* forecloses their having any interest in surplus trust assets.

In support of their position, the Annuitants rely heavily upon the Department of Labor's ("DOL") Advisory Opinion 2003-05A, (April 10, 2003), 2003 WL 1901900, in which the DOL opined on whether a plan sponsor was entitled under Title I of ERISA to retain the demutualization proceeds arising from a group annuity contract purchased in connection with the termination of a defined benefit plan. On this issue, the Department of Labor concluded:

> [N]o violation of Title I of ERISA would occur if [the plan sponsor] takes possession of the proceeds. The question of whether the employer or the beneficiaries of the termination annuity contract are the actual owners of the demutualization proceeds received by the employer as the named policyholder of the annuity is not within the jurisdiction of the Department of Labor under Title I of ERISA. Rather, this issue is governed by the terms of the contract and applicable state law.

*Id.* at 2.

The DOL merely opined that Title I of ERISA does not require that the demutualization proceeds be treated as plan assets following the plan's termination. Advisory Opinion 2003-05A. Missing from Advisory Opinion 2003-

05A, however, is any language supporting the Annuitants' argument that the beneficiaries should be the actual owners of the demutualization proceeds arising after a plan's termination.

Notably, the group annuity contract at issue in Advisory Opinion 2003-05A named the employer, not the trustee, as the policyholder. Therefore, upon the 2001 demutualization at issue before the DOL, the proceeds would not have gone necessarily into the underlying plan trust under the terms of the group annuity contracts. In contrast, the terms of the two Group Annuity Contracts at issue here designated the contract-holder as "Irving Trust Company, as Trustee" for the Plan. It is because BNY received the demutualization proceeds as the successor-in-interest to the "Trustee," that trust law principles and the terms of the underlying trust documents should be used to determine BNY's rights and responsibilities regarding the distribution of those proceeds.

This Court has repeatedly held that traditional principles of trust law give a trustee only those duties and powers conferred by the trust documents and those powers necessary or appropriate for carrying out the purposes of the trust. *See Varity Corp. v. Howe*, 516 U.S. 498 (1996); *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989); and *Central States, South East & South West Areas Pension Fund v. Central Transp., Inc.*, 472 U.S. 559 (1985). Therefore, the underlying trust documents and traditional principles of trust law should be used to determine a trustee's rights and responsibilities concerning the distribution of any funds coming into its hands – regardless of whether the plan for which the trust was created is ongoing or has been terminated or remains subject to ERISA. Advisory Opinion 2003-05A docs not stand for the proposition that courts can re-write group annuity contracts to give participants and beneficiaries additional benefits in excess of their "accrued

benefit." Such a conclusion is in direct conflict with a principal holding of *Hughes Aircraft*.

2. The Annuitants also rely upon this Court's recent decision in *Beck v. PACE Int'l Union*, 551 U.S. --, 127 S. Ct. 2310 (2007), to support their argument that the parties' legal rights are "transformed" upon termination of a pension plan. Opp., p. 4. An examination of *Beck*, however, actually supports Southwire's claim that it is the rightful owner of the Demutualization Proceeds in this case.

In *Beck*, this Court unanimously upheld an employer's right to a reversion of surplus funds in an over-funded, terminated defined benefit plan. 551 U.S. --, 127 S. Ct. at 2310. *Beck* involved competing claims to a $5 million reversion resulting from the standard termination of several consolidated and over-funded defined benefit pension plans. The Court was called upon to consider whether ERISA imposes a fiduciary duty on sponsors of terminating pension plans to consider merger with a multi-employer plan as a method of termination. In reaching the conclusion that merger is not a permissible form of termination under ERISA, this Court noted that a plan merger involves a continuation, rather than the cessation, of the ERISA regime. In contrast, "terminating a plan through purchase of annuities . . . formally severs the applicability of ERISA to plan assets and employer obligations," leaving participants with primarily state law remedies if proper payments under the annuity contracts are not made. *Id.* at 2319.

From this, the Annuitants argue that state contract law somehow entitles them to assets coming into the possession of Plan's trustee after termination. There is no language in *Beck*, however, which suggests this result. To the contrary, this Court expressly recognized in *Beck*, that "the common law of trusts . . . serves as ERISA's backdrop" and aids a determination of the rights and obligations of an

employer in its role as sponsor and administrator of a defined-benefit pension plan. *Id.* at 2316. *See also, e.g., Pegram v. Herdrich*, 530 U.S. 211, 224 (2000); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996). Therefore, regardless of whether ERISA statutory law continues to apply after a pension plan's termination, the common law of trusts and the plan documents should continue to govern the determination of the ownership of assets coming into the possession of a plan trustee.

Although the Annuitants rely upon *Beck* to support their position, there is nothing in this Court's holding in *Beck* which suggests that a court is permitted, as the majority opinion below did here, to ignore (i) the contract-holder's legal status as trustee, (ii) the underlying plan-trust documents and (iii) common law trust principles in determining whether the employer or plan participants are the actual owners of surplus trust assets following the plan's termination. Likewise, nothing in *Beck* suggests that courts should be permitted to re-write a group annuity contract to give pension plan participants and beneficiaries rights to surplus trust assets that they would not otherwise have. Indeed, *Beck* unanimously upheld a plan sponsor's right to surplus plan assets.

For purposes of this Court's consideration of certiorari review, the critical issue is whether, and how, trust law and contract law should be applied to promote consistency in determining the proper disposition of proceeds arising from the termination of a defined benefit pension plan.

3. The approach of the majority opinion below conflicts with *Stewart v. National Educ. Ass'n*, 471 F.3d 169 (D.C. Cir. 2006), and *RLJCS Enters., Inc. v. Professional Benefit Trust Multiple Employer Welfare Benefit Plan & Trust*, 487 F.3d 494 (7th Cir. 2007). In their attempt to

harmonize the majority opinion with these decisions, the Annuitants observe that the *Stewart* and *RLJCS* cases also involved on-going employee benefit plans, rather than a terminated plan. As demonstrated above, however, the fact that a plan has been terminated does not change the analysis of what a trustee must do with demutualization proceeds received as the contract-holder of an annuity contract or insurance contract purchased in connection with an employee benefit plan.

The Annuitants have articulated no principled reason why the approach used by the majority opinion below to construe (or re-write) the terms of the Group Annuity Contracts also could not have been used to add terms to the insurance contracts involved in *Stewart* or *RLJCS*. Prior to the legal changes in the 1990's which allowed the conversion of mutual insurance companies to stock companies, parties rarely, if ever, contemplated the prospect of demutualization (or any proceeds therefrom) when entering into insurance or annuity contracts with a mutual insurance company. If such contracts typically specified the appropriate recipient of proceeds in the event of demutualization, the parties likely would not be litigating these matters.

But these contracts and policies typically did not contain such a provision, beyond the basic provision of a policy-holder or contract-holder. Accordingly, in *Stewart* and *RLJCS*, the Circuit Courts properly held that the disposition of the demutualization proceeds turned on the terms of the governing plan document or trust instrument. Neither court attempted to add terms to the involved insurance contracts or to ignore the legal capacity of the contract-holder designated on the face of the contract.[2] In

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[2] Indeed, the case for adding "missing essential terms" to give additional rights to individual participants and beneficiaries arguably would have been stronger in *Stewart*, where the individual participants and

contrast, the majority opinion below ignored that a "trustee" was the contract-holder and re-wrote the Group Annuity Contracts to give additional benefits to the Annuitants. This approach conflicts with the Courts of Appeals' decisions in *Stewart* and *RLJCS*, thereby creating a split among circuits which this Court should now resolve

4. Policy considerations also support the conclusion that trust law principles and the plan documents should govern who owns demutualization proceeds arising in connection with a benefit plan. Employers may delay funding their plans for fear that they will lose surplus assets or reversion funds to which they would otherwise be entitled. Given the critical role played by employee benefit plans in our private health and retirement systems, it is potentially disastrous to have authority for the proposition that courts are permitted to re-write insurance or annuity contracts to give participants benefits that exceeded those intended by employers and set forth in plan documents.

This Court recognized similar policy considerations in *Beck* in determining that merger is not a permissible form of plan termination under ERISA, noting:

> For employers, the ill effects are demonstrated by the facts of this very case: by diligently funding its pension plans, Crown became the bait for a union bent on obtaining a surplus that was rightfully Crown's. All this after Crown purchased an annuity that none dispute was sufficient to satisfy its commitments to plan participants and beneficiaries.

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beneficiaries actually paid the premiums under the insurance contracts, than here, where the funds used to pay the premiums for the Group Annuity Contracts here came exclusively from Southwire.

*Beck*, 127 U.S. at 2321.

The situation here is not materially different from that in *Beck* – only the methodology utilized. Southwire fully funded the Plan. The Group Annuity Contracts undisputedly satisfied all accrued benefits owed to the Plan's participants and beneficiaries. Accordingly, trust principles and the underlying trust documents should be used to determine the owner of any assets coming into the hands of a plan trustee after the plan's termination.

5. The Annuitants' contention that the Question Presented does not raise a sufficient issue of federal interest is overly narrow and myopic. The Question Presented arises directly from annuity contracts purchased pursuant to provisions of ERISA applicable to the standard termination of defined benefit pension plans. The proper disposition of funds arising from the termination of an ERISA benefit plan presents an important issue in connection with the overall federal interest and oversight of such pension plans. Accordingly, it is appropriate for this Court to determine the proper legal principles to be used by other courts in deciding this issue.

6. Finally, Southwire is perplexed by the "Brief in Opposition" filed by Century Aluminum Company ("Century"). First, the Argument section of Century's Brief contradicts the title by stating that Century in fact "takes no position on whether the Court should grant the Petition." Century's Brief in Opposition, p. 5). Second, Century's Brief simply re-hashes contentions that were rejected by the district court and dismissed by the Sixth Circuit as being moot.

Century's Brief in Opposition attempts to restate the merits of Century's position in the underlying dispute, which is not appropriate at this stage and provides no assistance on

the issue of whether this Court should grant certiorari review. Because Century's Brief contains no arguments or information relating to the issues before the Court, Southwire will not respond to Century's assertions except to reiterate, for purposes of the record, that Southwire disputes those contentions.

In summary, the legal analysis applied to the Question Presented by the majority opinion below conflicts with this Court's decision in *Hughes Aircraft* and varies from Circuit to Circuit. In face of the conflicting claims continuing to surface as a result of the recent wave of demutualizations, as evidenced by *Stewart, RLJCS* and this case, and with more and more plan sponsors freezing and terminating defined benefit pension plans,[3] this Court should grant Southwire's Petition to clarify the correct legal principles to be used in determining the rightful owner of demutualization proceeds received by the trustee or administrator of an employee benefit plan (terminated or otherwise). This Court's guidance is needed to prevent lower courts from re-writing insurance contracts or annuity contracts to give participants and beneficiaries additional benefits to which they are not otherwise entitled under federal law or ordinary principles of trust law.

## CONCLUSION

For the foregoing reasons, and those in the petition, Southwire's petition for a writ of certiorari should be granted.

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[3] ERRI Notes "The Employment-Based Pension System: Evolution or Revolution?" July 2006, Vol. 27, No. 7.

Respectfully submitted,

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